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07-871

78

In The

Supreme Court of the United States

JOYCE EVANS, MIKE ARABIAN
DBA ARABIAN FARMS, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a Fifth Amendment Taking occur where a federal crop marketing order and the *Agricultural Marketing Agreement Act* require part of a crop be taken into federal ownership without just compensation promptly paid, as a condition to cleaning, stemming, sorting, processing, handling or selling the crop?

2. Does the Fifth Amendment's Takings Clause permit the United States to "exact" part of a harvest with a Regulation that prohibits crop cleaning, stemming and sorting unless the producer submits to the government's taking, or exaction, without promptly paid just compensation?

LIST OF PARTIES

The Petitioners are:

Joyce Evans, Mike Arabian dba Arabian Farms, Jack and Mary Blehm, Earl Boyajian, Lynden Brack, Richard and Sally Chavez dba Chavez Farms, Neil Donovan, William Donovan, David Flagler, Walter George Flagler dba Flagler Farms, Chris Gauss, Brad Hansen, David and Belanie Horne dba M&D Farming, Mike Jerkovich, Kuldip and Charanjit Kaleka dba Kaleka Farms, Loren T. Linscheid dba Linscheid Farms, Michael A. Logoluso, Rick L. Logoluso, Tony M. Logoluso, Wayne McFarlane, Mike Moles, Hunter Nadler, Tom and Teresa Ochoa dba Ochoa Farms, Gregory and Donna Patterson, Morris Pivovaroff, Peter Ramirez, Robert Schneider, Dale Sedoo, Walt Shubin, Wayne Snell, Srabian Farms GP, and Wilkens Farm

The Respondent is:

United States of America

CORPORATE DISCLOSURE STATEMENT

Petitioners disclose pursuant to Sup. Ct. R. 29.6:

No publicly held corporations and no political subdivisions of states are involved in this case.

The Petitioners are all raisin farmers in the Fresno, California area. Several use names for their farms as part of their business activity, but none are publicly traded or widely held.

No political subdivision is a party.

The United States is the Defendant. Its Department of Agriculture is involved.

The Raisin Administrative Committee ("RAC"), Fresno, California, is the agent of the USDA and is a Non-Appropriated Funded Instrumentality (NAFI).

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Origins and Original Significance of the Just Compensation Clause, 94 Yale L.J. 694 (1985) 26

Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 862 (1995) 27

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS BELOW

Court of Appeals For the Federal Circuit Opinion:

None published. Order (Pet. App. 1).

Court of Federal Claims Opinion:

Evans v. United States, 74 Fed. Cl. 554 (2006) (Pet. App. 2).

JURISDICTION

The court of appeals issued its judgment on October 4, 2007. No opinion was issued. No petition for rehearing en banc was filed. This Court has jurisdiction under 28 *U.S.C.* § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution

U.S. Const. amend. V, Takings Clause:

> . . . nor shall private property be taken for public use, without just compensation.

Statutes

7 *U.S.C.* § 608e, *Agricultural Marketing Agreements Act* of 1937 (in part).

(1) **Issuance by Secretary**

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. . . .

(2) **Commodities to which applicable**

Orders issued pursuant to this section shall be applicable only to

(A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any

regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of. . . . , cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables. . . . ; and

(B) any agricultural commodity. . . .

(6) **Terms – Other commodities**

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or

product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any

specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(I) establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: Provided, That with respect to orders applicable to . . . raisins . . . such projects may provide for any form of marketing

promotion including paid advertising and with respect to . . . raisins . . . may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order. . . .

(7) **Terms common to all orders**

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

* * *

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order;. . . .

(10) **Manner of regulation and applicability**

No order shall be issued under this section unless it regulates the handling of the

commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. . . .

* * *

(13) **Retailer and producer exemption**

(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

(14) **Violation of order**

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order shall, on conviction, be fined not less than $50 or more than $5,000 for each such violation, and each day during which such violation continues shall be deemed a separate violation. If the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation . . . except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

(15) **Petition by handler and review**

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or

any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. . . . The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title . . . shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

Regulations:

7 *C.F.R.* Pt. 989. Pertinent sections (Pet. App. 3) include:

Parts 11, 14, 15, 54, 55, 65, 66, 73 and 166. *See* Appendix.

STATEMENT OF CASE

Factual Background

Petitioners are independent raisin producers. They meet the definition of 7 *C.F.R.* § 989.11 as "producers" and do not sue as "handlers." The Raisin Advisory Committee ("RAC") is the agent of the United States and its Department of Agriculture. It administers the *Raisin Marketing Order*, 7 *C.F.R.* Pt. 989. The RMO is enacted under the authority of the *AMAA of 1937*. The government takes a significant part of the producer's crop when they deliver their raisins to a handler to be stemmed, sorted, cleaned, and prepared to be boxed or bagged for market. The part of the crop taken from them becomes federal property immediately, is used as the government sees fit, but is not paid for until nearly a year later, if at all. Then, far less than fair market value is paid for the exacted part of the raisin farmer's crop.

Annually, the RAC determines on an interim basis made binding when formalized by the Secretary of Agriculture, fractional levels for what part of the new crop will be "**free tonnage**" raisins. "Free tonnage" can be sold by producers in their discretion.

The RAC and Secretary declare the remainder of the crop to be "**reserve raisins**." These are not held in reserve despite their common names. They become federal raisins. Compensation is not paid for the reserve raisins when they are taken. The taking occurs simultaneously with delivery of raisins to handlers. A **handler** is anyone who stems, sorts, cleans, or otherwise processes raisins. A **producer** who does so is a handler.

Raisins cannot be sold unless they are stemmed, sorted, and cleaned. Until this occurs, they are useful for no commercial purpose.

The *Raisin Marketing Order* is unlike any other federal crop marketing order. Only the RMO among the nation's thirty-eight (38) active fruit, vegetable and nut marketing Orders takes a fraction of the crop for federal use, control, and immediate ownership, without payment. Other Orders provide for advance payment and for storage payments, *see* 7 *C.F.R.* §§ 981.54 (almonds), 987.147 (dates), 993.59 (prunes), 993.159 (reserve tonnage prunes), but not raisins.

Producers can sell free tonnage raisins when they want and get fair market value for them. Before they can do so, their raisins must be "handled." When handling occurs, a fraction of the crop, including the percentages described below in relevant years, are physically segregated. Title to the segregated "reserve raisins" passes to the government, and the raisins are transferred to government ownership and use. Producers lose all property rights to these reserve raisins but are not paid for them.

The Petitioners' Complaint, dismissed by the Claims Court, 74 Fed. Cl. 554 (Pet. App. 2), perceived the Petitioners' legal problem but suggested alternative methods to litigate it. The federal circuit affirmed without opinion. The Complaint provides the entire backdrop for this case. It was decided on a Rule 12 Motion. The Complaint affirmatively alleges these important facts:

1. Producers lose all property rights in the "reserve" raisins and are "never paid for them." (Compl. ¶ 35).

2. Producers have thrust upon them, but not by choice, an equity interest in a "reserve raisin pool" providing partial payments, but never full value, for the taken raisins. What is paid is up to the RAC and never constitutes just or complete compensation. (Compl. ¶¶ 36, 43).

3. Parties, basic terms, and concepts involved here are:

Joyce Evans, et al. Petitioners	Independent raisin producers. They make claims only as producers as defined by 7 *C.F.R.* § 989.11. (Compl. ¶¶ 9, 10) The Petitioners are farmers.
United States, Defendant	The USDA, created by 7 *U.S.C.* § 2202 is the Defendant. It uses the RAC as its agent in administering the *Raisin Marketing Order* (*RMO*).

Raisin Advisory Committee ("RAC")	Forty-seven (47) member committee appointed by Secretary. Makes recommendations about fractions of raisin crop to be devoted to "free tonnage" or taken as "reserve" raisins, 7 *C.F.R.* § 989.26.
Raisin Marketing Order 7 *C.F.R.* Pt. § 989	The *RMO* was promulgated by the Secretary under the *Agricultural Marketing Agreement Act*, 7 *U.S.C.* §§ 608(c)(7), *et seq.* The Order, or *RMO*, prescribes the taking about which the Petitioners complain.
Free Tonnage	Raisins that producers are able to sell on the open market, at fair market value.
Reserve Tonnage or Reserve Raisins	Raisins that producers cannot sell, but are taken by the USDA. When this occurs, producers lose all their rights in the taken raisins. *Lion Raisins, Inc. v. United States,* 416 F.3d 1356 (Fed. Cir. 2000).
Producer	"Producer means any person engaged in a proprietary capacity in production of grapes which are sun-dried or dehydrated by artificial means until they become raisins;. . . . " 7 *C.F.R.* § 989.11.

Packer	"Any person [in California] who stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market, but not included a producer who sorts and cleans unstemmed raisins." 7 *C.F.R.* § 989.14.
Handler	"(a) Any processor or packer; (b) any person who places, ships or continues nature-condition raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade . . . or other failing raisins . . . ; or (d) any person who blends raisins." 7 *C.F.R.* § 989.15.

Physical Events

1. The Complaint describes a series of physical events constituting the taking.

October 5, annually	RAC sets preliminary reserve raisin fraction
December, annually	Vine pruning begins and continues through January and February. (Compl. ¶ 22-23) (Raisins are an annual crop, but are produced on perennial vines, some of which are over 100 years old. Compl. ¶ 22. Harvest occurs in August and September.)

February 15, annually	Final figure is published for the fraction of "free tonnage" and "reserve" raisins permitted to be marketed. RAC and USDA issue this determination (Compl. ¶ 26).
1999-2000 through 2005-2006	Crop years at issue in (Compl. ¶ 34).
The post NAFTA Problem	Essentially, since the North American Free Trade Agreement (*NAFTA*) the reserve raisin pool has been used to provide raisins for foreign trade and to develop foreign markets. These markets are being subsidized at the Petitioners' expense. *Note:* There are no federal farm subsidies for raisin producers.

The *Agricultural Marketing Adjustment Act* of 1937 empowered the USDA to adopt marketing orders. 7 *U.S.C.* § 608c(6)(E). Compl. ¶ 29. The *Raisin Marketing Order* is entitled "Raisins Produced from Grapes Grown in California." It is codified at 7 *C.F.R.* § 989.1-95. Additional regulations extend from 7 *C.F.R.* § 989.102 to § 989.108.

The Reserve Pool was not part of the RMO when raisin producers voted to adopt the Order. (Compl. ¶ 31). Even if the Reserve Pool had been approved by producers in their referendum, it would be unconstitutional as applied, now.

Reserve raisins were confiscated (jurisprudentially, "exacted") by the government. Producers, including Petitioners, were not paid for the exacted crop. From 1999-2000 through 2005-2006, free and reserve tonnage percentages established by the United States were as follows. The Reserve fraction was exacted for public purposes:

Year	Free Tonnage Sold at FMV	Reserve Tonnage Not Compensated
1999-2000	85%	15%
2000-2001	53%	47%
2001-2002	63%	37%
2002-2003	53%	47%
2003-2004	70%	30%
2004-2005	100%	0%
2005-2006	82%	18%

(Compl. ¶ 34)

Raisins, unlike grapes, can be produced only in extremely isolated locations in four small regions in the world where grapes can be dried to raisins in the field with absolute absence of moisture during the critical drying period. Petitioners own or lease vineyards to grow grapes which are picked and dried to produce raisins. Raisin "ranches" range in size from 5 to 500-plus acres. In the United States, they are all located in California. Vineyards are costly, and take years to replace.

Petitioners use their own and hired labor to grow grapes, pick them, dry them in the field as raisins, load them in bins, and truck them to the processing plant for essential cleaning, stemming, sorting, and sale or custom packing. Petitioners' annual raisin production costs are $700-$800 per ton or more, including weed control, pest control, labor, cutting, replanting, harvesting, loading, binning, storing, interest, insurance, and trucking before the raisins arrive at the plant. (Compl. ¶ 23).

The price of raisins ranged from approximately $750 to $1,210 per ton over the six critical years (Compl. ¶ 24). Taking 15%-47% of the crop deprives producers of all their profits and their livelihoods. USDA, through the RAC, forcibly confiscates up to 47% of Petitioners' raisin crop each year. This confiscated volume is called "Reserve Tonnage." (Compl. ¶ 25). The industry wide raisin yield range for raisins is between 1.5 and 2.5 tons per acre. (Compl. ¶ 26).

An example helps. The reserve tonnage for the 2005/2006 Crop Year was 26%, finalized February 15, 2006. On a 100-acre raisin "ranch" averaging 2 tons of raisin production per acre, 52 tons, or 104,000 pounds of raisins will be transferred to government ownership as a result. Approximately 100 separate raisin bins will be taken from this hypothetical producer; he receives no just compensation for what is taken. The 2006 price was about $1,210 per ton. The value of this 100-acre farm's raisins taken by the government was $62,920. (Compl. ¶ 27).

History

The *AMAA of 1937* grants to USDA the power of:

> Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

7 *U.S.C.* § 608c(6)(E) (Compl. ¶ 29).

Several marketing orders arose from out of the *AMAA of 1937* (the Act). The *Raisin Order* was first issued in 1949. 7 *C.F.R.* § 989.1 to 989.95. The *Order* gave rise to the Raisin Regulations. 7 *C.F.R.* § 989.102 to 989.801. (Compl. ¶ 30).

The Reserve Pool was not a part of the *Raisin Order* when raisin producers voted on the proposed Order. Reserve Pool regulations were established after the most recent producer vote occurred. (Compl. ¶ 31). The RAC, established by the *Raisin Order*, has broad governmental powers, but is supervised and controlled by the USDA. RAC is a non-appropriated funded instrumentality (NAFI).

> The committee shall have the following powers:
>
> (a) To administer the terms and provisions of this part;
>
> (b) To make rules and regulations to effectuate the terms and provisions of this part;

(c) To recommend to the Secretary amendments to this part; and

(d) Receive, investigate, and report to the Secretary complaints of violations of this part.

7 *C.F.R.* § 989.35. (Compl. ¶ 32)

The RAC recommends interim Free Tonnage and Reserve Raisin percentages on or before October 5th each Crop Year, and final percentages on or before each February 15th. The final recommendation is submitted to the Secretary of Agriculture for approval. 7 *C.F.R.* § 989.54(b) to (d). The Secretary acts upon the recommendation by publishing the final binding "Free Tonnage" and "Reserve Tonnage" raisin percentages in the Federal Register. (Compl. ¶ 33).

The raisin confiscation rate has been as high as forty-seven percent (47%) in two (2) of the six (6) affected crop years. Nearly half of all raisins the Petitioners produced were taken by the government. Producers were not paid (Compl. ¶ 34). No business can survive this burden.

Free and Reserve tonnage raisins look, taste, smell, and feel exactly the same. Raisins are raisins. The taking occurs ***upon delivery*** to a packer. At delivery, the Order and Regulations require the raisin packer to physically set the Reserve tonnage raisin bins aside and store them for the government, the new legal owner. (Compl. ¶ 35). The packer does not become the owner of the reserve raisins – title to them moves from producer to the United States. All

new owners of raisins except the United States pay fair market value. The United States pays nothing.

Free tonnage is sold in the cash market. *Free-tonnage raisins* become raisins in school lunches packed by mothers, cereal products, bakery products, on grocery store shelves, and sprinkled throughout the food supply. *Reserve raisins* become food in federally-subsidized school lunches, military breakfast cereals, federal prison meals, public assistance foods, White House state dinners, and other government programs (Compl. ¶ 44). The raisins are indistinguishable, except producers are paid for Free-tonnage, but not for Reserve raisins. The Complaint starkly alleges in ¶ 36 that producers received "zero money" for Reserve-tonnage raisins.

Petitioners allege that producers receive illusory – and often valueless – rights to future equity payments from the money remaining in the crop year's Reserve Pool after the government does what it wants with the Reserve raisins. Producers get an illusory government IOU, but it is never paid at full value. Sometimes, when the government chooses, it pays a little, but it never pays the IOU in full. Sometimes it pays nothing. Payment is always postponed, and interest is never paid. *Id.* Reserve Raisins exaction from Petitioners began after *NAFTA* was enacted in 1993. 19 *U.S.C.* §3301 *et seq.*

Raisin production is not subsidized. Producers, including Petitioners, are not paid to raise Reserve tonnage raisins. They pay all fixed and variable costs

to produce the entire crop, and get no support for the part the government exacts. (Compl. ¶ 36.4).

After reserve raisins are taken, they are held in segregated bins for the RAC. The RAC disposes of them through "alternative marketing channels." (Compl. ¶ 37). The RAC physically gives some taken raisins to packers in a "Raisin Back" program. *Id.* Approximately $132 million in raisins were transferred, through the Reserve Pool, directly to packers during affected crop years. These packers are the same organizations that buy the producers' free tonnage. Of course, "Raisin Back" fruit depresses the free tonnage price. Since raisins are raisins, packers like the free ones from the government better than the ones they must buy at fair market value. Petitioners, as producers, received little or no "producer equity" payments during this time. (Compl. ¶ 38). In short, the Reserve Pool accomplishes the precise opposite of its intended purpose. It lowers prices instead of increasing them.

The RAC and government use heavy handed compliance tools to enforce the *Raisin Marketing Order*, and the Reserve Program. Petitioners have no choice but to comply. Enforcement is required to force producers to facilitate these takings. Deterrence from non-compliance is a major goal of the RAC and USDA. An RAC "Compliance Committee" oversees these efforts, and a RAC "Compliance Officer" carries out the function. USDA investigators and government

investigative tools are used. RAC has unrestricted access to packer's[1] plants and records for inspections. 7 *C.F.R.* § 989.77. (Compl. ¶ 40). Producers have no market except through packers. As is shown below, even packing one's own fruit makes one a handler and triggers the Reserve Raisin taking according to the government. This is the *Catch 22* of the Raisin Marketing Order. Raisins must be stemmed, sorted and cleaned to be sold. Stemming, sorting and cleaning are "handling." Anyone who does this work is a handler. Stemming, sorting and cleaning, i.e., handling, triggers the Reserve Raisin exaction. Producers cannot avoid the exaction by cleaning and selling their own crops. They are stuck: either tear out their vines and raise something else, or suffer the exaction. Petitioners respectfully submit this is not tolerable government action unless Fifth Amendment just compensation is paid. The packer gets its money, and government kickbacks, in the Raisin Back program. The government gets cheap or free raisins.

Reserve raisin regulations are enforced with vigor. The government requires reports to be filed to assure compliance. These include:

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[1] A "packer" is a "handler" under the *Raisin Order*. 7 *C.F.R.* §§ 989.14, 989.15. All packers are handlers. All handlers are not packers. Anyone, including a producer, who cleans, stems or sorts is a handler, and raisins cannot be sold unless they are cleaned, stemmed and sorted. There is no escape from the exaction of "reserve raisins."

> RAC-1 Forms, "Weekly Report Of Standard Raisin Acquisitions," authorized by 7 *C.F.R.* § 989.73(b),
>
> RAC-20 Forms, "Monthly Reports Of Free Tonnage Raisin Disposition," authorized by 7 *C.F.R.* § 989.73(d),
>
> RAC-50 Forms, "Inventory Of Free Tonnage Standard Quality Raisins On Hand," authorized by 7 *C.F.R.* § 989.73(a),
>
> RAC-51 Forms, "Inventory Of Off-Grade Raisins On Hand," authorized by 7 *C.F.R.* § 989.73(a).

(Compl. ¶ 41).

Raisins packers and handlers have three (3) business days to segregate reserve raisin bins for ownership by the government. 7 *C.F.R.* § 989.66(b)(1); 7 *C.F.R.* § 989.166(b). Once a Reserve "stack" or group of bins – each containing 900 to 1,200 pounds of raw, unprocessed raisins – is identified, they may not be used because they belong to the government. Handlers must deliver the Reserve raisins upon demand, or pay damages. 7 *C.F.R.* § 989.166(c). (Compl. ¶ 42). No one pays the producers for the taken crop at this time.

The federal circuit decided, in a previous raisin case, that the Petitioners are stripped of all property interests in the raisins by the reserve pool requirements. *Lion Raisins, Inc. v. United States*, 416 F.3d 1356 (Fed. Cir. 2005) (Compl. ¶ 43).

The Complaint, taken as admitted since this case is before the Court on a Rule 12 ruling, contains stark facts about the takings of the Petitioners' property. Raisins are property within the meaning of the Takings Clause. These raisins are taken by the government and the RAC when Reserve Pool transfer occurs at a handler's plant. The Petitioners lose their property rights in the raisins, and receive no just compensation – usually no compensation at all. (Compl. ¶ 47).

The Petitioners neither assert nor concede the *Raisin Marketing Order* and its Regulations are within the *AMAA of 1937*'s scope of authority. (Compl. ¶ 47). The Complaint dismissed below was not a challenge claiming the *Raisin Order*, 7 *C.F.R.* Pt. § 989, violates the *AMAA*.

Procedural History

Petitioners sued as representatives on behalf of all raisin producers as a putative class. The government responded by seeking dismissal for failure to state a claim upon which relief could be granted. The claims court decided the case on a Rule 12 motion, and the court of appeals reviewed it, and affirmed it, on this basis.

REASONS TO GRANT THE PETITION

A. The Fifth Amendment's Payment Obligation has not been Addressed Recently.

This Court's recent takings jurisprudence focused on what justifies the exercise of eminent domain authority. *Kelo v. City of New London,* 545 U.S. 469 (2005). This Court has not addressed, since *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), whether just compensation must be paid when a clear, unambiguous taking has occurred, because title to an asset has been transferred to the government and payment has not been made. Affirmation of this fundamental obligation of government and literal application of the Fifth Amendment's Takings Clause, require this Court's attention. The issues are worthy of this Court's consideration. It has not considered the just compensation aspect of the Fifth Amendment for many years. There is no clear test emergent from prior jurisprudence.

The thirty-five (35) specialty crop marketing orders[2] for various crops govern the nations' most basic industry, agriculture and no longer work as they did 60 years ago when they originated. They have come to harm producers, not help them. As the economy turns, sometimes once effective laws become antithetical to what was intended. When the turn is

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[2] Twelve (12) specialty crop marketing orders have disappeared since 1981.

as dramatic as 180 degrees, this can mean a law becomes applied in an unconstitutional fashion. The *AMAA* is now used to effectuate takings without just compensation, not to create reserves for which the producer receives *quid pro quo*. This Court is asked to examine the *Raisin Marketing Order*, which governs the entire raisin industry, for its Fifth Amendment importance.

The facts here are stark. The taking is apparent. The government claims its *Raisin Marketing Order* is valid as a tool to regulate markets. The Fifth Amendment does not permit the government to regulate property by taking part of it from its owners in order to make the remainder more valuable. It is the taking of property, not the arguable (though absent) enhancement in value to the remainder, that is forbidden by the Fifth Amendment. *See Loretto*, 458 U.S. at 434-435. ("When the 'character of the governmental action,' is a permanent physical occupation of property, cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.") (citation omitted).

Petitioners focus, here, on the government's actual taking of raisins from producers, not attempts to regulate the raisin market. The Takings Clause appears to have been understood, originally, as applying only to appropriation of private property, not regulation of it. Note, *Origins and Original Significance of the Just Compensation Clause*, 94 Yale L.J.

694 (1985); Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099 (2000).

Takings have long been permitted in the United States when a broad "public use" test considering matters of public health, recreation, enjoyment, and welfare are considered. *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923); *Berman v. Parker*, 345 U.S. 26, 32-3 (1954); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984). Petitioners' complaint is not that the taking occurs, but that they are not paid for what is taken.

The Takings Clause places two (2) limitations on the power of eminent domain:

(1) The power must be used to further the public welfare, and

(2) The government must pay "just compensation" when it takes property. *Id.; Kelo v. City of New London.*

A number of scholars have written about this and have nearly uniformly agreed with this history. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 862 (1995); Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L.J. 1245, 1253 (2002).

B. The Fifth Amendment Requires that Just Compensation be Paid Promptly; This Court has Never Addressed the Prompt Payment Issue.

The Takings Clause's just compensation requirement prohibits postponement in payment or reduction in acquisition price from fair market value when the government takes something from a citizen. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). But the Raisin Reserve commands postponed payment, and uncompensated takings.

The original draft of the Takings Clause, "[n]o persons shall be obliged to relinquish his property, where it may be necessary for public use, without just compensation," and the final version, passed without recorded debate by the nation's founders. Bickford *et al. Documentary History of the First Federal Congress: Legislative Histories* at 10 (Veit Ed. 1986). Petitioners raise here the lack of just compensation, not just the taking. This Court's attention has been devoted primarily to what constitutes a public purpose for taking. "What is a taking" jurisprudence ranges from old: *Van Horne's Lessee v. Dorrance*, 2 Dall. (2 U.S.) 304 (1795); *Calder v. Bull*, 3 U.S. 386 (1798); *Wilkinson v. Leland*, 2 Pet. (27 U.S.) 627 (829); *Missouri Pac. RRY Co. v. Nebraska*, 164 U.S. 403 (1896); to new: *Kelo v. City of New London*, 545 U.S. 469 (2005).

But, little attention has been devoted to what must be paid, and when payment must be made, to

satisfy the Fifth Amendment's requirements. "Just compensation" has long been presumed to require that fair market value be paid, in cash, effective as of the time of taking. "Just compensation generally means the full monetary equivalent of the property taken." *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

Hon. Learned Hand once cautioned that when reference is made to the Fifth Amendment's prohibition against taking private property without just compensation it must be remembered that "we are dealing with a constitutional limitation, and there is no surer way to misapprehend its scope than to ignore its history, and treat it as inspired test." *Madison v. Heron Stevedoring Corp.*, 204 F.2d 88, 97 (2d Cir. 1953) (Hand, J. concurring). Certiorari is proper so this Court can refocus judicial attention on the just compensation limitation, and the fact its nonpayment is a taking in and of itself. Taking procedure can be acceptable, but nonpayment violates the Fifth Amendment. This is the problem the Petitioners face.

Where fixed prices do not approximate the market value of a good, and it is physically taken and transferred to the government, the difference between what the government does pay, and the market price, is required for just compensation to be paid. *United States v. Commodities Trading Corp*, 339 U.S. 12, 123 (1950).

In *Commodities Trading Corp*, this court held that the Fifth Amendment's Taking Clause's use of

the phrase "just compensation . . . evoked case by case problems."

> This court has never attempted to prescribe a rigid rule for determining what is "just compensation" under all circumstances and in all cases. Fair market value has normally been accepted as a just standard. But, when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards. Since the market value standard was developed in the context of a market largely free from government controls, prices rigidly fixed by law raise questions concerning whether a "market value" so fixed can be a measure of "just compensation." [Citation omitted.] Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is "just" both to an owner whose property is taken, and to the public that must pay the bill?

In the context of the *Emergency Price Control Act*, 50 *U.S.C.* §§ 901 *et seq.*, the Fifth Amendment was held to require "fairness" and "equity" as "the primary standards prescribed for sealing prices under the Act, and, therefore, as guidance to a value that might represent just compensation and could not be ignored in ascertaining it." This Court held that even in emergency circumstances, a price control act did not "constitute the measure of just compensation for property taken under the Fifth Amendment."

Commodities Trading, supra, 339 U.S. at 124. This ruling was handed down in a case involving regulations enacted to stabilize prices during Word War II. *Id.*

Since 1950, this Court visited the "just compensation" constitutional requirement only infrequently and in a limited way. *United States v. Fuller*, 409 U.S. 488, 490, observed, "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, *United States v. Commodities Trading Corp.* [citation omitted] as it does from technical concepts of property law." In *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 478 (1973), *Fuller* was cited and paraphrased for the same proposition noted previously. The Court declined to designate market value as the sole measure of just compensation, again, in *United States v. 564.54 Acres of Land*, 441 U.S. 506, 512 (1979), holding, "There are situations where this standard is inappropriate."

But, no case has permitted the government to take a crop from a producer, transfer title to itself, and pay the producer less than just compensation. And, no case has dealt with delayed payments. A genuine public need exists for this Court to grant certiorari and use this case to confirm that the government cannot take, or exact, property without just compensation. The fair market value of raisins can be ascertained readily. Each time a taking occurs, a portion of the crop is sold as "free tonnage" at market

price, and the rest is confiscated to federal ownership. This Court is asked to declare this is not permissible.

These issues are worthy of the Supreme Court's consideration. The Court has not focused on the just compensation portion of Fifth Amendment jurisprudence for a long while, and certainly has not done so since many decisions in many areas of the law have moved toward the market-driven economics currently found in legal expression in areas like anti-trust law, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007). As the nation's production facilities, in agricultural and otherwise, become more concentrated, the just compensation issue becomes more significant, requiring consideration as more of the nation's economy is involved in each takings transaction. *See* Heffernan, Wm., et al. "Concentration of Agricultural Markets," Department of Rural Sociology, University of Missouri (April 2007); "The State of Agricultural Commodity Markets 2004," United Nations Food and Agricultural Organization, http://www.fao.org/docrep/007/y5419e/y5419e00.htm (2004).

C. This Court has Not Considered Property Exactions from Citizens as Conditions to Participation in Government Programs.

This case is a physical exactions case. Petitioners claim exactions like the one undertaken here are impermissible. This Court held in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972):

> The duty to compensate for what the government takes is absolute. When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes even though that use is temporary. Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, or when its planes use private airspace to approach a government airport, it is required to pay for that share no matter how small.

(Internal citations omitted).

This Court's two (2) exaction opinions, *Knollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Doland v. City of Tigard*, 512 U.S. 374 (1994) involved Fifth Amendment takings challenges to adjudicative land-use exactions, i.e., government demands that a landowner dedicate an easement allowing public access to property as a condition to obtaining a development permit. *Doland* at 379-380; *Knollan* at 828.[3]

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[3] This Court dealt with exaction issues in explaining its holding in *Lingel v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546 (2005), but *Lingel* did not advance exactions jurisprudence. *Lingel*, like *Noland* and *Knollan*, was essentially a regulatory takings case.

In each of these two (2) cases, the Court began with a premise that had the government appropriated the easement it would have been a *per se* physical taking. The question was whether the government could, without compensation, effectuate such a taking as a condition for granting a development permit. In *Knollan*, the Court answered in the affirmative, provided that the exaction would substantially advance the same government interest that would furnish a valid ground for denying a permit. 483 U.S. at 834-37. The Court refined this requirement in *Doland*, holding that "an adjudicative exaction requiring dedication of private property must also be "roughly proportional . . . both in nature and extent to the impact of the proposed development." 512 U.S. at 391.

This case asks whether these exaction standards applied to the real estate development setting justify exacting, or exacting from private ownership the government's raisin needs for any particular year, by commanding an owner give them up, without payment, or with inadequate payment on delayed terms. Petitioners respectfully submit that nothing in this Court's long Fifth Amendment jurisprudence suggests an affirmative answer is permissible.

Unlike the exaction cases in this Court's history, the taking at issue involves no government regulation but instead mandates a government toll to enter the

market – though the government obviously knows the entire object of producing raisins is to sell them.

CONCLUSION

The Petitioners respectfully request the Court grant the petition, hear and decide this case on the merits, and use the significant questions presented to address important Fifth Amendment physical takings and just compensation legal considerations affecting the nation and its economy.

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APPENDIX

Judgment – United States Court of Appeals for the Federal Circuit ..... App. 1

Published Opinion – United States Court of Federal Claims ..... App. 4

Judgment sought to be reviewed – United States Court of Federal Claims..... App. 35

Excerpts from the Regulations Cited ..... App. 36

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-5045

JOYCE EVANS, MIKE ARABIAN, dba Arabian Farms, AULAKH FARMS, INC., JACK BLEHM, MARY BLEHM, EARL BOYAJIAN, LYNDEN BRACK, RICHARD CHAVEZ, SALLY CHAVEZ, dba Chavez Farms, NEIL DONOVAN, WILLIAM DONOVAN, DAVID FLAGLER, WALTER GEORGE FLAGLER, dba Flagler Farms, CHRIS GAUSS, BRAD HANSEN, DAVID HORNE, MELANIE HORNE, dba M&D Farming, MIKE JERKOVICH, KULDIP KALEKA, CHARANJIT KALEKA, dba Kaleka Farms, LOREN T. LINSCHEID, dba Linscheid Farms, MICHAEL A. LOGOLUSO, SR., RICK L. LOGOLUSO, TONY M. LOGOLUSO, WAYNE MCFARLANE, MIKE MOLES, HUNTER NADLER, TOM OCHOA, TERESA OCHOA, dba Ochoa Farms, GREGORY PATTERSON, DONNA PATTERSON, MORRIS PIVOVAROFF, PETER RAMIREZ, ROBERT SCHNEIDER, DALE SEDOO, WALT SHUBIN, WAYNE SNELL, SRABIAN [sic] FARMS GP, and WILKENS FARM,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

David A. Domina, Domina Law Group PC LLO, of Omaha, Nebraska, argued for plaintiffs-appellants.

Timothy P. Mcilmail [sic], Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the briefs were Peter D. Keisler, Acting Attorney General, Jeanne E. Davidson, Director, and Mark A. Melnick, Assistant Director. Of counsel on the brief was Heather M. Pichelman, United States Department of Agriculture, of Washington, DC.

James S. Burling, Pacific Legal Foundation, of Sacramento, California, for amicus curiae.

Appealed from: United States Court of Federal Claims

Judge Charles F. Lettow

Judgment

(Filed Oct. 4, 2007)

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

in CASE NO(S). 06-CV-439.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam: (MAYER and GAJARSA, *Circuit Judges* and RESTANI, *Judge.**):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF
THE COURT

DATE: Oct. 4, 2007 /s/ Jan Horbaly
Jan Horbaly, Clerk

* Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

In the United States Court of Federal Claims

No. 06-439C

(Filed: December 22, 2006)

* * * * * * * * * * * * *)	
JOYCE EVANS, *et al.*,	) Takings Clause;
Plaintiffs,	) Commerce Clause;
	) Agricultural Marketing
v.	) Agreement Act of 1937;
UNITED STATES,	) motion to dismiss for
	) failure to state a claim;
Defendant.	) RCFC 12(b)(6)
* * * * * * * * * * * * *)	

David A. Domina, DominaLaw Group, PC, LLO, Omaha, Nebraska, for plaintiffs. On the briefs was Michael C. Stumo, DominaLaw Group, PC, LLO, Omaha, Nebraska. Of counsel were Claudia L. Stringfield-Johnson, DominaLaw Group, PC, LLO, and Brian C. Leighton, Law Offices of Brian C. Leighton, Clovis, California.

Timothy P. McIlmail, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant. With him on the briefs were Assistant Attorney General Peter D. Keisler, David M. Cohen, Director, Commercial Litigation Branch, and Mark A. Melnick, Assistant Director, Civil Division, United States Department of Justice, Washington, D.C.

James S. Burling, Principal Attorney, Pacific Legal Foundation, Sacramento, California, for *amicus*

curiae Pacific Legal Foundation. Of counsel was Timothy Sandefur, Attorney, Pacific Legal Foundation, Sacramento, California.

OPINION AND ORDER

LETTOW, Judge.

Plaintiffs are raisin growers in California who claim that the United States, in its implementation of the Agricultural Marketing Agreement Act of 1937 ("Agricultural Marketing Act"), Pub. L. No. 75-137, 50 Stat. 246 (codified as amended at 7 U.S.C. §§ 601-74), by promulgating the currently effective raisin marketing order under the statute, has taken their property without just compensation in contravention of the Fifth Amendment of the United States Constitution. The Agricultural Marketing Act authorizes the Secretary of Agriculture (the "Secretary") to issue marketing orders for various agricultural products, including raisins, in an effort to limit the supply of such products on the open market and thus to stabilize prices. The raisin marketing order does not explicitly regulate raisin producers (*i.e.*, growers), but it imposes draconian regulations on handlers – those who stem, sort, clean, seed, package, or process raisins – by requiring them to transfer to the government's Raisin Administrative Committee ("RAC") an annually specified portion of the raisins they buy from producers. Specifically, handlers must physically separate these "reserve tonnage" raisins for the government from the remaining "free tonnage" raisins,

which handlers may sell on the open market. The marketing order in effect causes handlers to purchase from producers only the "free tonnage" raisins, with producers receiving an equity interest in the "reserve tonnage" raisins in the government's hands. The RAC may sell or dispose of "reserve tonnage" raisins in secondary, non-competitive markets, and must pay over to the equity-interest holders any net proceeds remaining after it has completed its operations for any given crop year.

Plaintiffs filed their complaint on June 1, 2006, alleging that the Agricultural Marketing Act and regulations promulgated under that Act, including the currently effective raisin marketing order, result in an uncompensated taking of the "reserve tonnage" portion of the raisins they transfer to handlers. Compl. ¶¶ 46-47, 2, 27. In further support of their claim, plaintiffs assert that their equity return on the net proceeds from the sale of these "reserve tonnage" raisins has been worthless or nearly so in recent years. *Id.* ¶ 45. Plaintiffs seek certification as a class, a declaration that the statutory and regulatory bases for the marketing order violate the Fifth Amendment, an injunction to prevent the United States Department of Agriculture ("USDA") from enforcing the raisin marketing order, and damages. *Id.* ¶¶ 15-20, 51.

The government has filed a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC"), contending that plaintiffs have not presented a cognizable takings claim.

Def.'s Mot. to Dismiss at 4. Plaintiffs have responded by arguing that the government has mischaracterized their claim as a regulatory taking, rather than a *per se* physical taking, and that the federal government's authority under the Commerce Clause to regulate interstate commerce does not trump the Takings Clause of the Fifth Amendment. Pl.'s Brief Opposing Def.'s Mot. to Dismiss ¶¶ 1, 14, 29. The Pacific Legal Foundation has filed a brief as *amicus curiae* in support of plaintiffs, averring that the raisin marketing order confers no benefit on plaintiffs and imposes an involuntary transfer of a portion of plaintiff's raisins to the government. Briefing has been completed and the court has held a hearing on the pending motions. For the reasons set out below, the government's motion to dismiss is granted.

BACKGROUND[1]

In the midst of the Great Depression, Congress passed the Agricultural Marketing Act, which sought to address "the disruption of the orderly exchange of commodities in interstate commerce [that] impair[ed] the purchasing power of farmers and destroy[ed] the value of agricultural assets." Agricultural Marketing Act, 50 Stat. at 246. The Act authorizes the Secretary

[1] The recitations that follow do not constitute findings of fact by the court. Rather, the recited factual elements are taken from the parties' pleadings and other filings and are either undisputed or are alleged and assumed to be true for purposes of the pending motion.

to promulgate marketing orders for raisins, among other agricultural commodities, restricting the amount of raisins from a given crop year that raisin handlers in California may sell on the open market. *See* 7 U.S.C. § 608c(1), (2), (6)(C); *see also* 7 C.F.R. §§ 989.4, 989.65, 989.66(a)-(b)(1), 989.257 (2006).[2]

Under the Agricultural Marketing Act, the Secretary may delegate to industry committees the power to administer marketing orders, and these committees may recommend to the Secretary changes to existing orders. 7 U.S.C. § 608c(7)(C); *see* 7 C.F.R. § 989.35 (2006).[3] The raisin marketing order, originally issued in 1949, Handling of Raisins Produced from Raisin Variety Grapes Grown in California, 14 Fed. Reg. 5136 (Aug. 18, 1949) (codified, as amended, at 7 C.F.R. Part 989), created the RAC, a raisin industry group currently composed of forty-seven members, including thirty-five who represent producers, ten who represent handlers, one who represents a cooperative bargaining association, and one who

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[2] Section 8c of the Agricultural Marketing Act, 7 U.S.C. § 608c, the key statutory provision dealing with the marketing orders, originated in a 1935 amendment to the Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31. *See* Act of Aug. 24, 1935, Pub. L. No. 74-320, § 5, 49 Stat. 750, 753-61. The Agricultural Marketing Act reenacted much of the Agricultural Adjustment Act, including Section 8c. *See* Agricultural Marketing Act, § 1(e), 50 Stat. at 246.

[3] References to the raisin marketing order and to other USDA regulations are to those revised as of January 1, 2006, unless otherwise noted.

represents the public. *See* California Raisin Marketing Order, 71 Fed. Reg. 4805, 4805-06 (Jan. 30, 2006). The RAC is an agent of the federal government, *see Lion Raisins, Inc., v. United States,* 416 F.3d 1356, 1368 (Fed. Cir. 2005) (*"Lion Raisins III"*), whose members are nominated by industry groups and appointed by the Secretary. 7 C.F.R. §§ 989.26, 989.29, 989.30. The RAC receives no federal appropriations, but is funded by assessments levied on handlers and proceeds from the sales of "reserve tonnage" raisins withheld from the open market. *See* 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

By February 15 of each crop year,[4] the RAC must recommend to the Secretary the portion of the raisin crop that should be made available for sale without restrictions ("free tonnage" raisins) and the portion that should be withheld from the market ("reserve tonnage" raisins). *See* 7 C.F.R. §§ 989.54(d), 989.65. Based on the RAC's recommendations and after obtaining the approval of two-thirds of the raisin producers[5] or of producers of two-thirds of the raisins "produced for market," the Secretary promulgates a regulation fixing the percentages of "reserve tonnage"

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[4] The raisin crop year runs from August 1 of a given year until July 31 of the next year. *See* 7 C.F.R. § 989.21.

[5] A producer is "any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins." 7 C.F.R. § 989.11.

and "free tonnage" raisins. 7 U.S.C. § 608c(8)(A)-(B), (9)(B)(i)-(ii); 7 C.F.R. §§ 989.55, 989.65.

Using a reserve pool mechanism, the raisin marketing order requires handlers[6] to separate the raisins they purchase from producers (*i.e.*, raisin growers) into two discrete sets of bins: one for "free tonnage" raisins and the other for "reserve tonnage" raisins. 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66(b)(2). Upon delivery to a handler, title to the "free tonnage" raisins passes to the handler, but title to the "reserve tonnage" portion of a producer's raisins automatically transfers to the RAC for sale in secondary, non-competitive markets. *See* 7 C.F.R. §§ 989.65, 989.66(a), (b)(1), (4) ("reserve tonnage" raisins acquired by a handler "shall be held by him for the account of the [RAC]").[7]

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[6] A handler is "(a) [a]ny processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions]." 7 C.F.R. § 989.15. A processor is any person who receives raisins and uses them in California to make a product other than raisins for marketing or distribution. 7 C.F.R. § 989.13. A packer is "any person who, [in California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins," but does not include a producer who sorts and cleans unstemmed raisins. 7 C.F.R. § 989.14.

[7] The RAC may dispose of "reserve tonnage" raisins in non-competitive markets by sale to handlers serving specified outlets or for resale to exporters for sales abroad, by direct sale to the United States or foreign governments, by gift, or by any other

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Producers are entitled by regulation to an equitable distribution of the net proceeds from the RAC's disposition of the "reserve tonnage" raisins. *See* 7 C.F.R. §§ 989.66(h); *see also* Raisin Administrative Committee, *Analysis Report* 10 (2001), available at http://www.raisins.org ("Funds generated from reserve pool sales programs, net of costs, become the growers' equity."). The RAC usually needs several years to dispose of the "reserve tonnage" raisins for a given year. *See* California Raisin Marketing Order, 71 Fed. Reg. at 4806. As a result of these restrictions, handlers pay producers for the "free tonnage" portion of the raisins, but not for the "reserve tonnage" raisins. Compl. ¶ 27; *Lion Raisins III*, 416 F.3d at 1360.[8]

The Agricultural Marketing Act explicitly excludes raisin producers from regulation, 7 U.S.C. § 608c(13)(B), but the expansive regulatory definition of a handler, *see supra* at 557 n.6, captures within its scope any producer who seeds, grades, packages, or stems raisins or places raisins into interstate commerce. *See* 7 C.F.R. §§ 989.14, 989.15. The government may seek injunctive relief, as well as civil and

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means consistent with 7 U.S.C. § 608c. 7 C.F.R. § 989.67(b). Plaintiffs allege that proceeds from "reserve tonnage" raisins are used to subsidize raisin packers' exports and school lunch programs, as well as to fund more than half of the RAC's budget. Compl. ¶¶ 37, 44.

[8] The price handlers pay producers for "free tonnage" raisins is negotiated privately by handlers' and packers' bargaining associations. *See Lion Raisins III*, 416 F.3d at 1360; Compl. ¶ 24 & n.4.

criminal penalties, against handlers who violate the raisin marketing order. *See* 7 U.S.C. §§ 608a(5), 608a(6), 608c(14); *see also In re Saulsbury Enters., Inc.*, 55 Agric. Dec. 6, 7, 17 (May 7, 1996) (holding that a raisin producer who shipped largely uncleaned raisins to Canada was a handler subject to civil penalties for violating a raisin marketing order); 7 C.F.R. § 989.166(c) (providing that a handler who refuses to turn over his "reserve tonnage" raisins to the RAC shall compensate the RAC according to the market price for such raisins).

The raisin marketing order shares many of the characteristics of marketing orders for other agricultural products. *Compare* 7 C.F.R. Part 989 (Raisin Marketing Order), *with* 7 C.F.R Parts 930 (Tart Cherry Marketing Order), 981 (Almond Marketing Order), 984 (Walnut Marketing Order), 985 (Spearmint Oil Marketing Order), 993 (Prune Marketing Order).[9] Like other such orders, the raisin marketing order grants to the industry committee, the RAC, the power to sell or dispose of all of the reserves, *compare* 7 C.F.R. § 989.67(a) (raisins), *with* 7 C.F.R. §§ 981.66(a) (almonds), 984.56 (walnuts), 993.65(a)

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[9] Pursuant to 7 C.F.R. § 993.90(a), the handling requirements for the marketing order for prunes were suspended indefinitely by the Secretary in August 2005. *See* Dried Prunes Produced in California; Suspension of Handling and Reporting Requirements, 70 Fed. Reg. 50,153 (Aug. 26, 2005); *see also* Dried Prunes Produced in California; Suspension of Handling and Reporting Requirements, 70 Fed. Reg. 30,610 (May 27, 2005).

(prunes), and also gives either handlers or producers a proportional interest in the net proceeds from any reserve sales. *Compare* 7 C.F.R. § 989.65(e) (raisins), *with* 7 C.F.R. §§ 981.66(e) (almonds), 984.56(e) (walnuts), 993.65(e) (prunes). Nonetheless, the raisin marketing order stands out from most of its counterparts in two respects: it effects a direct transfer of title of a producer's "reserve tonnage" raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account. 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66(b)(2).

Marketing orders for agricultural products have been controversial, and considerable litigation has recently arisen about them. Recently, the raisin marketing orders have been a focal point for such litigation. In 2005, the Federal Circuit decided *Lion Raisins III,* 416 F.3d 1356, a consolidated appeal of two cases in which Lion Raisins, Inc. ("Lion"), a raisin producer and handler, mounted Fifth Amendment takings challenges that were related to those in this case, but that relied on different substantive allegations. In *Lion Raisins, Inc. v. United States,* 58 Fed. Cl. 391 (2003) ("*Lion Raisins I*"), Lion, in its capacity as a producer, alleged that the RAC's use of proceeds from 1997 "reserve tonnage" raisins to finance export programs during the 1998 and 1999 crop years constituted a taking entitling it to just compensation. *Lion Raisins III,* 416 F.3d at 1361. Lion claimed that the RAC had violated the Agricultural Marketing Act and the pertinent raisin marketing

order by not transferring to Lion its equitable share in the 1997 reserve pool. *Id.* at 1369. The Federal Circuit affirmed dismissal of Lion's suit on the ground that "a claim premised on a regulatory violation does not state a claim for a taking" in the Court of Federal Claims. *Id.*; *see also Rith Energy, Inc. v. United States,* 247 F.3d 1355, 1366 (Fed. Cir. 2001) (noting that a takings claim premised on an alleged statutory or regulatory violation does not state a claim cognizable in the Court of Federal Claims under the Tucker Act because suits for just compensation in the Court must rest on a taking for public use, the legality of which is not challenged). In commenting on an additional claim made by Lion that a change in the reserve pool benefits constituted a physical taking of the plaintiff's raisins, the Federal Circuit remarked that "once the raisins were transferred to the RAC, Lion no longer had a property interest in the raisins themselves, but only in its share of the reserve pool proceeds as defined by the regulations." *Lion Raisins III,* 416 F.3d at 1369 n.9 (citing 7 C.F.R. § 989.66(h)).

In the companion case, *Lion Raisins, Inc. v. United States,* 57 Fed. Cl. 435 (2003) ("*Lion Raisins II*"), Lion, in its capacity as a handler, pressed a Fifth Amendment takings claim by alleging that the RAC had not returned raisin bins in which Lion had transferred reserve raisins to the RAC. *Lion Raisins III,* 416 F.3d at 1361, 1370. Lion sought compensation for the bins and for a rental fee for the RAC's use of the bins. *Id.* at 1361. The Federal Circuit affirmed the dismissal of this suit as well, stressing that 7 U.S.C.

§ 608c(15) provides an administrative remedy for any handler who alleges that "any [] order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law." *Id.* at 1370. Noting that the Supreme Court described 7 U.S.C. § 608c(15) as providing an explicit remedy to an aggrieved handler, *id.* at 1371 (citing *United States v. Ruzicka,* 329 U.S. 287, 292 (1946)), the court stated: "We have repeatedly held that Tucker Act review of takings claims is precluded where Congress has provided 'a specific and comprehensive scheme for administrative and judicial review.'" *Id.* at 1372 (quoting *Vereda, Ltda. v. United States,* 271 F.3d 1367, 1375 (Fed. Cir. 2001) (in turn quoting *St. Vincent's Med. Ctr. v. United States,* 32 F.3d 548, 550 (Fed. Cir. 1994))).[10]

STANDARD FOR DECISION

"Dismissal of a complaint under RCFC 12(b)(6) is appropriate when the plaintiff can prove no set of facts that would warrant the requested relief, when drawing all well-pleaded factual inferences in favor of the complainant." *Levine v. United States,* 453 F.3d

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[10] To the same effect, the D.C. Circuit recently ruled in *Edaleen Dairy, LLC v. Johanns,* 467 F.3d 778 (D.C. Cir. 2006), that a producer-handler who wishes to challenge a new rule that eliminated an exemption for large producer-handlers and required them to pay into a producer settlement fund, was required first to exhaust administrative remedies by petitioning the Secretary of Agriculture for relief.

1348, 1350 (Fed. Cir. 2006) (citing *Leider v. United States,* 301 F.3d 1290, 1295 (Fed. Cir. 2002)).[11] In ruling on a motion under RCFC 12(b)(6), the court must decide "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 511 (2002) (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974)). A motion to dismiss should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

ANALYSIS

A. *The Federal Government's Power to Regulate Interstate Commerce*

Plaintiffs' takings claims are intertwined with the question of what power the federal government possesses to regulate the raisin industry. Pls.' Sur-Reply Br. Opposing Def.'s Mot. to Dismiss ¶ 5.

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[11] Under the Tucker Act, 28 U.S.C. § 1491(a), this court possesses subject matter jurisdiction of a takings claim against the United States. *See Preseault v. Interstate Commerce Comm'n,* 494 U.S. 1, 12 (1990). In pertinent part, the Tucker Act provides that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution." 28 U.S.C. § 1491(a). The RAC is an agent of the United States, and the United States may be sued in this court for any takings without just compensation allegedly committed by the RAC. *See Lion Raisins III,* 416 F.3d at 1368.

Plaintiffs claim that they have only three options for disposing of their raisins: (1) preparing the raisins for sale to the public, thereby subjecting themselves to the marketing order as handlers; (2) selling the raisins to handlers, again subjecting themselves to the marketing order; or (3) consuming all of the raisins on their farms. *Id.* For all practical purposes, plaintiffs claim, they cannot sell raisins without the government gaining title to and control over a fixed portion as "reserve tonnage" raisins. *See id.*; Compl. ¶¶ 46-47.

Under the Commerce Clause of the Constitution, Congress may regulate the channels of interstate commerce, the instrumentalities of interstate commerce, and persons or things in interstate commerce, including activities that "substantially affect" interstate commerce. *Perez v. United States,* 402 U.S. 146, 150, 152 (1971). Included in the last category are "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich,* 545 U.S. 1, 17 (2005).

Illustrative of Congress's power to regulate intrastate activity – and in particular intrastate agricultural activity – is the Depression-era decision in *Wickard v. Filburn,* 317 U.S. 111 (1942). In *Filburn,* at issue were regulations promulgated under amendments to the Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31. The regulations, which were designed to control the volume of wheat in interstate and foreign commerce and

thereby stabilize prices, established a wheat acreage allotment for an Ohio farmer named Roscoe Fillburn of 11.1 acres and a yield of 20.1 bushels per acre. *Filburn,* 317 U.S. at 114-15. Mr. Fillburn sowed 23 acres and in due course harvested 239 bushels of wheat from the 11.9 acres that exceeded his designated allotment. *Id.* at 114. In a suit filed in federal district court, Mr. Fillburn contended that the imposed quotas were unconstitutional under the Commerce Clause because the excess wheat he sowed and harvested was intended solely for consumption on his farm and had at most an indirect effect on interstate commerce. *Id.* at 118-19. After Mr. Fillburn prevailed in a three-judge district court proceeding, the Supreme Court reversed. In sweeping language, the Supreme Court firmly rejected Fillburn's argument:

> But even if [Fillburn's] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'

Id. at 125.

Filburn had been partially foreshadowed by the Supreme Court's decision in *United States v. Rock Royal Co-Op., Inc.,* 307 U.S. 533, 569 (1939), which specifically upheld the constitutionality of the

Agricultural Marketing Act under the Commerce Clause.[12] The far-reaching scope of *Filburn* has remained intact to this day, having been recently reaffirmed in 2005 by the Supreme Court in *Raich*. *See Raich*, 545 U.S. at 17-18; *id.* at 37 & n.2 (Scalia, J., concurring in the judgment) ("The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself 'substantially affect' interstate commerce.").

Congress's power to regulate the raisin industry in the manner prescribed by the Agricultural Marketing Act is governed by *Filburn*. Nonetheless, Congress's power to act under the Commerce Clause does not immunize the federal government from a takings claim under the Fifth Amendment. The Commerce Clause, just as the War Power, may well provide the underpinnings for a taking, but the Supreme Court

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[12] In *Rock-Royal*, the operation of the Agricultural Marketing Act was upheld in the context of a milk marketing order, in the face of Fifth Amendment due process and takings contentions advanced as defenses to an enforcement action. *See Rock-Royal*, 307 U.S. 533. One of the primary defenses in *Rock-Royal* was that an equalization pool established by the milk marketing order at issue, intended to provide a relatively uniform or weighted-average price for milk of similar quality, deprived milk producers of their liberty and property. *Id.* at 571-72. That broad contention was rejected on the basis of Congress's power under the Commerce Clause: "As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, we are of the opinion it might permit the movement on terms of pool settlement here provided." *Id.* at 572.

has explicitly stated that there is no "blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority." *Kaiser Aetna v. United States,* 444 U.S. 164, 172 (1979); *see also United States v. Pewee Coal Co.,* 341 U.S. 114, 115-116 (1951) (taking occurred when the government took control of a coal mine during wartime, to assure continued production in the face of a threatened strike). In this same vein, the Federal Circuit has concluded that "the Government's proper exercise of regulatory authority does not automatically preclude a finding that such action is a compensable taking." *Yancey v. United States,* 915 F.2d 1534, 1540 (Fed. Cir. 1990). In short, the Commerce Clause may provide the authority for a taking, but it does not negate the Fifth Amendment's command that the government, having taken a person's property, must pay just compensation. *See id*; *Kaiser Aetna,* 444 U.S. at 174.

B. *The Scope of the Raisin Marketing Order and Other Such Orders*

The scope of the raisin marketing order is remarkable, but in many ways is typical of other marketing orders. Marketing orders for other agricultural products also employ a variation of the reserve pool mechanism used in the raisin marketing order. *See, e.g.,* 7 C.F.R §§ 930.55-.57 (tart cherries), 981.50-.58 (almonds), 984.54-.56 (walnuts), 985.57 (spearmint oil), 993.56-.65 (prunes). Some marketing orders simply require the handler to hold the reserve portion in his or her possession, *see, e.g.,* 7 C.F.R. § 984.54(b)

(requiring a walnut handler to hold reserve walnuts "in his possession or under his control"), while one requires an industry committee, under certain circumstances, to hold the reserves on behalf of individual producers. 7 C.F.R. § 985.57(a) ("The Committee shall store reserve [spearmint] oil for the account of the producer."). Most marketing orders give the industry committee that is acting as the government's agent a plenary power to sell or dispose of the reserves, *see* 7 C.F.R. §§ 981.66(a) (almonds), 984.56(a) (walnuts), 989.67(a) (raisins), 993.65(a) (prunes), but such orders also give either handlers or producers a proportional interest in the net proceeds from any reserve sales. 7 C.F.R. §§ 981.66(e) (almonds), 984.56(e) (walnuts), 989.66(h) (raisins), 993.65(e) (prunes).

In addition to the raisin marketing order, two other marketing orders as a practical matter effect a shift in beneficial ownership somewhat akin to the direct transfer of title of which plaintiffs in this case complain. An almond handler must "at all times, hold in his possession or under his control, in proper storage *for the account of the Board,* the quantity of almonds necessary to meet his reserve obligation." 7 C.F.R. § 981.52 (emphasis added). Nonetheless, handlers do have the option of selling their reserve almonds in non-competitive markets, subject to conditions set by the Board. 7 C.F.R. § 981.67; *see also Cal-Almond, Inc. v. United States,* 30 Fed. Cl. 244, 245 (1994), *aff'd,* 73 F.3d 381 (Fed. Cir. 1995) (Table, text in Westlaw). Moreover, almond growers may sell

their almonds at a roadside stand free of the marketing order's regulation of handlers. *See* 7 C.F.R. § 981.13 (excluding from the definition of handlers any producer who makes such roadside sales).

Under the marketing order for prunes, handlers are required "at all times, [to] hold, in [their] possession or under [their] control, in proper storage *for the account of the committee,* free and clear of all liens, the quantity of prunes necessary to meet [their] reserve obligation." 7 C.F.R. § 993.57 (emphasis added). Nonetheless, prune handlers are not required to effect a physical separation of reserve prunes from "salable" prunes. 7 C.F.R. §§ 993.57, 993.54; *see Prune Bargaining Assoc. v. Butz,* 444 F.Supp. 785, 788-89 (N.D. Cal. 1975) ("These reserve prunes are not physically segregated from the salable prunes, however, and thus the reserve is, in fact, a paper reserve.").[13]

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[13] Based solely on the regulatory language, the marketing orders for almonds, walnuts, and prunes explicitly include within the definition of a handler intrastate attempts by producers to market their crops. *See* 7 C.F.R. §§ 981.11, 981.13, 981.16 (handler includes any person who "put[s] almonds . . . into any channel of trade for human consumption . . . within [California]"); 7 C.F.R. §§ 984.4, 984.13, 984.14 (handler includes any person who "put[s] walnuts . . . in the current of commerce within [California]"); 7 C.F.R. §§ 993.4, 993.13, 993.14 (handler includes any person who "place[s] prunes in the current of the commerce within [California]"). The definition of a raisin handler, at least on its face, covers interstate efforts by producers to market their crops. 7 C.F.R. §§ 989.4, 989.15 (handler includes "any person who places . . . raisins in the current of

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The raisin marketing order, although similar to the almond and prune marketing orders, appears to be stricter. Not only does title to a producer's "reserve tonnage" raisins pass immediately to the government upon sale to a handler, but the handler must physically segregate those raisins for the RAC's account. 7 C.F.R. §§ 989.54, 989.65, 989.66(b)(2).

C. *Plaintiffs' Takings Claim*

1. *Fifth Amendment takings principles.*

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). In this context, "[t]he Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment." *Maritrans v. United States,* 342 F.3d 1344, 1352 (Fed. Cir. 2003) (*citing Bd. of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972)). Rather, "existing rules or understandings" and "background principles" derived from independent sources,

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commerce from within [California] *to any point outside thereof*") (emphasis added). Plaintiffs' complaint avers that the raisin marketing order, in practice, regulates even purely intrastate activity. *See* Compl. ¶¶ 46-47; Pls.' Sur-Reply Br. Opposing Def.'s Mot. to Dismiss ¶ 5.

such as state statutes or common law, define the scope of property rights for Takings Clause purposes. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1030 (1992). Based on these principles, in a takings case, a court must first establish whether a plaintiff holds a property interest for purposes of the Fifth Amendment and then, if such a property interest exists, determine whether a taking occurred. *See Members of Peanut Quota Holders Ass'n v. United States,* 421 F.3d 1323, 1330 (Fed. Cir. 2005).

Physical takings are compensable, *see Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 427 (1982), while regulatory takings may or may not be compensable depending upon the circumstances. *See Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). For an alleged regulatory taking, the court must make an "essentially ad hoc, factual inquir[y]" guided by three factors – (1) the character of the governmental action, (2) the economic impact of the action, and (3) the degree of interference with the reasonable, investment-backed expectations of the property owner. *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 124-28 (1978); *see also Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 325-328 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606, 634 (2001) (O'Connor, J., concurring).

2. *Plaintiffs' property interest in their raisins.*

Plaintiffs contend that this is a physical, not a regulatory, takings case, primarily because the raisin producers must give up title to the reserve raisins to the RAC in connection with the producers' sale of free-tonnage raisins to handlers. *See* Pls. Opp. to Def.'s Mot. to Dismiss ("Pls.' Opp.") at 5-8. The government resists any finding of a taking of a property interest, contending that plaintiffs' participation in the raisin production business is purely voluntary, as is their marketing of raisins. Def.'s Reply at 2. As the government would have it, "the reserve pool mechanism [established by the raisin marketing order] is the price of entering that market." *Id.*

Plaintiffs claim that the raisin marketing order leaves raisin growers in an untenable position – they must subject themselves to an involuntary transfer of a portion of the raisins they grow, let their raisins rot in their fields, or eat all of their raisins. Compl. ¶¶ 46-47; Pls.' Sur-Reply Br. Opposing Def.'s Mot. to Dismiss ¶ 5. Plaintiffs also complain that their equity interest in the net proceeds from the "reserve tonnage" raisins has become worthless for practical purposes. Compl. ¶ 45.

The government stresses that plaintiffs do not and cannot allege that the government has entered their property and seized the raisins, that plaintiffs are forced to introduce their raisins into interstate commerce, or that the marketing order forces plaintiffs to sell their raisins to handlers. Def.'s Mot. to

Dismiss at 8. Citing *Wallace v. Hudson-Duncan Co.*, 98 F.2d 985 (9th Cir. 1938), the government also asserts that Congress has the power under the Commerce Clause to "destroy" an entire industry without running afoul of the Fifth Amendment's Takings Clause, regardless of whether the regulated product is raisins or contraband. *See* Hr'g Tr. 8:22 to 9:2; 13:15-21; 15:1-9 (Nov. 21, 2006).[14]

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[14] In this respect, the government overstates the holding in *Wallace*. In *Wallace*, the majority opinion for a panel that divided 2 to 1, stated that "even if the [walnut packer] were able to show (which it has not done) that the only alternative to making delivery to the Control Board of surplus [i.e., reserve] walnuts . . . would be to go out of business," case law would support upholding the walnut marketing order. *Wallace*, 98 F.2d at 990. Putting aside that the hypothetical is dictum, the cases the court cited in support of this proposition, *see id.* (citing *Montana Timber Co. v. Washington*, 243 U.S. 219 (1917); *Noble State Bank v. Haskell*, 219 U.S. 104 (1911)), did not confirm that destruction of an entire industry was permissible under the Commerce Clause without implicating the Fifth Amendment's Due Process or Takings Clauses. Rather, the cited cases upheld regulatory schemes, imposed respectively by the states of Washington and Oklahoma, in which individual participants were required to contribute to a pool even though any distributions from the pool might not fully compensate them for their original contributions. *See id.* Although the court indicated that the plaintiff in *Wallace* had the option of avoiding the walnut regulations altogether by "retirement from the business," the facts of the case did not present the question whether the federal government had power to destroy an entire industry without implicating the Takings or Due Process Clauses. *See* 98 F.2d at 990-91. In any event, action taken in reliance upon the Commerce Clause manifestly is not immune from takings challenges. *Kaiser*, 444 U.S. at 172; *Yancey*, 915 F.2d at 1540.

Here, under California law, plaintiffs unquestionably had title to their raisins grown in their fields. *See* Cal. Rev. & Tax Code § 6016 ("'Tangible personal property' means personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses.").[15] Upon sale and transfer of the raisins to a handler, the producers acquired in exchange personal property consisting of cash (for the "free tonnage" raisins) and an equitable interest in the net proceeds of the "reserve tonnage" raisins. Plaintiff producers thus had a property interest in the raisins, and they retained a property interest in the proceeds from the raisins. The real question is whether their transactions with handlers resulted in a "physical" taking.

Plaintiffs argue that the transfer of reserve-tonnage raisins in connection with the sale of free-tonnage raisins to the handlers was involuntary – that once plaintiffs decided to grow raisins, there was no escape from the raisin marketing order, plaintiffs had no ability to opt out, and the result was a *per se* taking. *See* Pls.' Sur-Reply Br. Opposing Def.'s Mot. to Dismiss ¶ 5. This contention is unavailing. Although the RAC gains title to some of the

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[15] This definition of "tangible personal property" applies for tax purposes, not for California law generally, *see Filmservice Labs., Inc. v. Harvey Bernhard Enters., Inc.*, 208 Cal. App. 3d 1297, 1305 (1989), but the definition nonetheless accords with common-law usage relating to goods, products, and agricultural commodities. *See* Cal. Com. Code § 2105(1) (definition of "goods").

raisins that plaintiffs grow, the transfer does not have the same consequences as, for example, entry by governmental officials upon their land for purposes of confiscating their raisins would have. There is no physical invasion of property, *see Loretto,* 458 U.S. at 421 (cable television company's installation of its cable facilities on plaintiff's property); *Pewee Coal,* 341 U.S. at 115-16 (federal occupation of plaintiff's coal mine), nor is there any "direct appropriation of property." *Carruth v. United States,* 627 F.2d 1068, 1081 (Ct. Cl. 1980) (addressing peanut marketing regulations). Instead, the government is the recipient of a portion of the raisins that plaintiffs shipped to handlers subject to the marketing order. *See Carruth,* 627 at 1081; *Wallace,* 98 F.2d at 989-90 (upholding walnut marketing regulations). In essence, plaintiffs are paying an admissions fee or a toll – admittedly a steep one – for marketing raisins. The government does not force plaintiffs to grow raisins or to market the raisins; rather, it directs that *if* they grow and market raisins, then passing title to their "reserve tonnage" raisins to the RAC is their admission ticket. *See Wallace,* 98 F.2d at 989 ("The [marketing] [o]rder contains no absolute requirement of the delivery of walnuts to the Control Board. The requirement is a conditional one.")[16]

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[16] However harsh the consequences of the raisin marketing order, the consequences attendant to marketing raisins were known in advance. Although the transfer of title to the reserve raisins to the RAC cannot be considered as "voluntary" in the

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In the circumstances at hand, if plaintiffs have a takings claim, it would relate to their property interest, equitable in nature, in the net proceeds from the disposition of the "reserve tonnage" raisins. 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h). In this case, however, plaintiffs have put forward no explicit claim as to this property interest, and the court will not consider that such a claim has been made by implication from plaintiffs' contention that their equitable interest has in recent years proven to be worthless or nearly so. Among other things, such a claim would have to be limned with particularity, and there appear to be at least four conceptually possible avenues for plaintiffs to pursue vindication of their property rights in the equity pool.[17]

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sense that it was a desired outcome of intended action, neither was it an unexpected result of such action. *See Carruth*, 627 F.2d at 1081 (peanut regulations); *Wallace*, 98 F.2d at 989-90 (walnut regulations); *cf. Lucas*, 505 U.S. at 1027-1028 ("[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)."); *Norman v. United States*, 429 F.3d 1081, 1089 (Fed. Cir. 2005) (rejecting plaintiffs' takings challenge where plaintiffs "did transfer title in the wetland acreage . . . , [but] the record is clear that the title transfer was voluntary").

[17] Because the "free" and "reserve" percentages vary from crop year to crop year, *see* Compl. ¶ 34, and in some years there may be no reserve at all, plaintiffs would have difficulty posing generic, facial claims about their equitable interest in the

(Continued on following page)

First, plaintiffs could make a regulatory takings claim, arguing that the RAC, by returning only meager pool proceeds to plaintiffs, effected a taking. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1330-31 (Fed. Cir. 2003). Instead, plaintiffs here claimed a taking of their property interest in raisins they had already exchanged for cash and equity interests in the reserve pool. Compl. ¶¶ 46-47, 51.

Second, plaintiffs might petition the Secretary of Agriculture for an administrative remedy. As producers, plaintiffs are specifically excluded from the Agricultural Marketing Act's scope, 7 U.S.C. § 608c(13)(B), and administrative remedies are limited to handlers. 7 U.S.C. § 608c(15). Plaintiffs claim, Hr'g Tr. 64: 7-14 (Nov. 21, 2006), and the government concedes, Def.'s Resp. to Pls.' Post-argument Submissions of Additional Authorities at the Court's Request at 1, that producers have no remedy under the Agricultural Marketing Act. In administrative proceedings, the Secretary has adhered to this interpretation of the statute. *See, e.g., In re Kent Cheese Co.*, 43 Agric. Dec. 34, 36 (1984) (denying standing to petitioner who did not allege he was a handler under the regulatory definition); *In re M&R Tomato Distribs., Inc.*, 41 Agric. Dec. 33, 33 (1982) (same). Nonetheless, if plaintiffs themselves packaged their raisins or introduced them into interstate commerce, they would be

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reserve pool. *See, e.g., id.* ¶ 34.6 (no reserve for crop year 2004-05).

deemed handlers, *see* 7 C.F.R. §§ 989.14, 989.15, and would then have an administrative remedy. 7 U.S.C. § 608c(15).

Third, plaintiffs could file suit in federal district court, alleging that the Secretary or the RAC has violated the Agricultural Marketing Act, the raisin marketing order, or the associated regulations. As producers, plaintiffs might qualify for the narrow exception to the general rule that *handlers* must exhaust their administrative remedies under the Agricultural Marketing Act. *See Stark v. Wickard,* 321 U.S. 288, 309 (1944). As the Supreme Court explained:

> When . . . *definite personal rights are created by federal statute,* . . . the silence of Congress as to judicial review is, at any rate *in the absence of an administrative remedy,* not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction.

Stark, 321 U.S. at 309 (emphasis added). Given the specific "personal right" to a proportional share of the reserve pool net proceeds, 7 C.F.R. § 989.66(h), and the circumstance that an administrative remedy is limited to handlers, 7 U.S.C. § 608c(15), plaintiffs might sue in federal district court without first seeking an administrative remedy. *See Stark,* 321 U.S. at 311; *Edaleen Dairy,* 467 F.3d at 782-83. Unlike the plaintiffs in *Lion Raisins III,* 416 F.3d at 1369-70, however, plaintiffs in this case do not contend that

the government has violated the Agricultural Marketing Act or the raisin marketing order, *see* Compl. ¶¶ 4, 48-51, but rather, they claim that the government's application of the statute and the marketing order has taken their "reserve tonnage" raisins without just compensation. *Id.* ¶¶ 46-47, 51.

Fourth, plaintiffs might claim they were subject to an illegal exaction. The species of claim known as an illegal exaction has several variations. A plaintiff may sue for a sum "improperly exacted or retained" in violation of the Constitution, a statute, or a regulation. *United States v. Testan,* 424 U.S. 392, 401 (1976); *see also Eastport S. S. Corp. v. United States,* 372 F.2d 1002, 1007 (Ct. Cl. 1967) (*overruled on other grounds* by *Malone v. United States,* 849 F.2d 1441, 1444-45 (Fed. Cir. 1988)). Alternatively, a plaintiff may pursue an allegation that a "particular provision of law relied upon grants [him], expressly or by implication, a right to be paid a certain sum" and that he has not been so paid. *Eastport S. S. Corp.,* 372 F.2d at 1007; *see also Aerolineas Argentinas v. United States,* 77 F.3d 1565, 1573 (Fed. Cir. 1996) (an airline could seek reimbursement of costs borne by it for transporting aliens who had sought political asylum in the United States, because the costs were paid "at the direction of the government to meet a governmental obligation"). An illegal exaction constitutes a compensable violation of the Fifth Amendment's Due

Process Clause. *See Norman,* 429 F.3d at 1096.[18] To prevail, plaintiffs would need to demonstrate that the Secretary or the RAC had violated the Agricultural Marketing Act, the raisin marketing order, or the associated regulations and that the government's conduct had a "direct and substantial impact on [them]." *Casa de Cambio Comdiv S.A., de C.V. v. United States,* 291 F.3d 1356, 1364 (Fed. Cir. 2002); *accord Norman,* 429 F.3d at 1096; *Ontario Power Generation, Inc. v. United States,* 369 F.3d 1298, 1303 (Fed. Cir. 2004). Plaintiffs have made no such illegal exaction claims as to their equitable interest in the reserve pool.

Any of these reserve-pool claims would reach well beyond the scope of the challenged complaint. In short, the producer plaintiffs have made no claims as to the one affected property interest that results from their growing and marketing activities – their equity interest in the reserve pool. Accordingly, they have not stated a claim upon which relief can be granted under RCFC 12(b)(6).

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[18] Although "[t]he Court of Federal Claims ordinarily lacks jurisdiction over due process claims under the Tucker Act, 28 U.S.C. § 1491, . . . [it] has been held to have jurisdiction over illegal exaction claims 'when the exaction is based upon an asserted statutory power.'" *Norman,* 429 F.3d at 1095 (quoting *Aerolineas Argentinas,* 77 F.3d at 1573, and citing *Eastport S.S. Corp.,* 372 F.2d at 1008).

CONCLUSION

For the reasons set forth, the government's motion to dismiss under RCFC 12(b)(6) is GRANTED. The Clerk shall enter judgment accordingly. No costs.

It is so ORDERED.

/s/ Charles F. Lettow
Charles F. Lettow
Judge

In the United States Court of Federal Claims

No. 06-439 C

JOYCE EVANS, ET AL.,

v.

THE UNITED STATES

JUDGMENT

(Filed Dec. 22, 2006)

Pursuant to the court's Published Opinion and Order, filed December 22, 2006, granting the government's motion to dismiss under RCFC 12(b)(6),

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

Brian Bishop
Clerk of Court

December 22, 2006 By: s/ Lisa DeFade Reyes
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of *all plaintiffs*. Filing fee is $455.00.

7 C.F.R. Sec. 989.11 Producer.

Producer means any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins: Provided, That a "producer" shall include any person whose production unit has qualified for diversion under a diversion program announced by the Committee.

[50 FR 1831, Jan. 14, 1985]

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7 C.F.R. Sec. 989.14 Packer.

Packer means any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins: Provided, That:

(a) No producer with respect to the raisins produced by him, and no group of producers with respect to raisins produced by the producers comprising the group, and not otherwise a packer, shall be deemed a packer if he or it sorts or cleans (with or without water) such raisins in their unstemmed form;

(b) Any dehydrator shall be deemed to be a packer, with respect to raisins dehydrated by him, only if he stems, cleans with water subsequent to such dehydration, seeds or packages them for market as raisin;

(c) The committee may, with the approval of the Secretary restrict the exceptions as to permitted

cleaning if necessary to cause delivery of sound raisins; and

(d) No person shall be deemed a packer by reason of the fact he repackages for market (with or without additional preparation) packed raisins which, in the hands of a previous holder, have been inspected and certified as meeting the applicable minimum grade standards for packed raisins.

[32 FR 12158, Aug. 24, 1967]

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7 C.F.R. Sec. 989.15 Handler.

Handler means: (a) Any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins: Provided, That blending shall not cause a person not otherwise a handler to be a handler on account of such blending if he is either: (1) A producer who, in his capacity as a producer, blends raisins entirely of his own production in the course of his usual and customary practices of preparing raisins for delivery to processors, packers, or dehydrators; (2) a person who blends raisins after they have been placed in trade channels by a packer with other such raisins in trade channels;

or (3) a dehydrator who, in his capacity as a dehydrator, blends raisins entirely of his own manufacture.

[37 FR 19622, Sept. 21, 1972]

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7 C.F.R. Sec. 989.54 Marketing policy.

(a) Trade demand. On or before August 15 of each crop year, the Committee shall hold a meeting to review shipment data, inventory data, and other matters relating to the quantity of raisins of all varietal types. For any varietal type for which a free tonnage percentage may be recommended, the Committee shall compute a trade demand. The trade demand shall be 90 percent of the prior crop year's shipments (converted to a natural condition weight) of free tonnage and reserve tonnage sold for free use for that varietal type, into all market outlets, adjusted by the carryin on August 1 of the current crop year and the desirable carryout for the varietal type at the end of that crop year. If the prior year's shipments were limited because of crop conditions, the Committee may select the shipments of one of the three years preceding the prior crop year. The desirable carryout shall be increased from 45,000 to 60,000 tons for Natural (sun-dried) Seedless raisins at a rate of 5,000 tons per year for three crop years following the effective date of this amended subpart. The desirable carryout for Dipped Seedless raisins shall be 1,500 tons, and for Oleate and Related Seedless raisins, 1,500 tons. The trade demand computed by

the Committee shall be announced by the Committee in accordance with paragraph (h) of this section.

(b) Preliminary percentages. On or before October 5 of each crop year (except that the Committee may extend this date not more than five business days if warranted by a late crop), the Committee shall estimate the production of any varietal type of raisins for which it has computed a trade demand. If the Committee determines that volume regulation is desirable during the crop year for that varietal type, it shall compute and announce preliminary free and reserve percentages for that varietal type: Provided, That such production estimate shall include by varietal type the raisins handlers are expected to acquire from producers and the total tonnage of raisins diverted under a raisin diversion program. The Committee shall compute a preliminary free percentage to release 85 percent of the computed trade demand, if it determines that a field price has been established for that varietal type, or 65 percent of the trade demand if no field price has been established. The preliminary free percentage shall be computed by multiplying the trade demand by either 85 percent or 65 percent (as the case may be) and dividing the product by the estimated production of that varietal type and rounding the resulting percentage to the nearest full percent. The difference between 100 percent and the preliminary free percentage shall be the preliminary reserve percentage.

(c) Interim percentages. Prior to February 15, the Committee may modify the preliminary free and

reserve percentages to release less than the trade demand.

(d) Final percentages. No later than February 15, the Committee shall recommend to the Secretary, final free and reserve percentages which will tend to release the full trade demand for any varietal type for which preliminary or interim percentages have been computed and announced. The difference between any final free percentage designated by the Secretary and 100 percent shall be the final reserve percentage. With its recommendation, the committee shall report on its consideration of the factors in paragraph (e) of this section.

(e) Factors. When computing preliminary and interim percentages, or determining final percentages for recommendation to the Secretary, the Committee shall give consideration to the following factors:

(1) The estimated tonnage held by producers, handlers, and for the account of the Committee at the beginning of the crop year;

(2) The expected general quality and any modifications of the minimum grade standards;

(3) The estimated tonnage of standard and off-grade raisins which will be produced;

(4) If different than the computed trade demand, the estimated trade demand for raisins in free tonnage outlets;

(5) If not estimated as provided in paragraph (a) of this section, an estimated desirable carryout at the end of the crop year for free tonnage and, if applicable, for reserve tonnage;

(6) The estimated market requirements for raisins outside free tonnage outlets, considering the estimated world raisin supply and demand situation;

(7) Current prices being received and the probable general level of prices to be received for raisins by producers and handlers;

(8) The trend and level of consumer income;

(9) Any prohibition of trade practices, pursuant to Sec. 989.62 intended for the crop year; and

(10) Any other pertinent factors bearing on the marketing of raisins including the estimated supply of and demand for other varietal types and regulations applicable thereto.

(f) Modification. In the event the Committee subsequently deems it advisable to modify its marketing policy on any crop, because of national emergency, crop failure, or other major change in economic conditions, it shall hold a meeting for that purpose, and file a report thereof with the Secretary within 5 days (exclusive of Saturdays, Sundays, and holidays) after the holding of such meeting, which report shall show such modification and the basis therefor.

(g) Reserve tonnage to sell as free tonnage. On or before November 15 of the crop year, the Committee

shall make two simultaneous offers of reserve tonnage to handlers to sell as free tonnage for each varietal type for which preliminary percentages have been computed and announced. One offer shall consist of a quantity equal to 10 percent of the prior year's (or the alternative year selected by the Committee pursuant to paragraph (a) of this section) shipments of free tonnage and reserve tonnage sold for free use into all market outlets to equate the current year's supply with the prior year's shipments. This offer shall be allocated to handlers on the basis of their prior year's acquisitions. The second offer, to provide for market expansion, shall consist of a quantity equal to 10 percent of the prior year's (or the alternative year selected by the Committee pursuant to paragraph (a) of this section) shipments of free tonnage and reserve tonnage sold for free use. This offer shall be allocated to handlers on the basis of their prior year's shipments of free tonnage and reserve tonnage sold for free use. Each offer shall be open to handlers not more than five business days, and subsequently, two offers of any tonnage unsold in the original offers open not more than two business days each, may be made. The reoffer tonnage shall be allocated to handlers who purchase 100 percent of their allocation in preceding offers, and shall be on the basis of the quantity each handler purchased, as a percentage of the total quantity purchased by all handlers eligible to participate. At the close of the second reoffer, any remaining tonnage may be offered to handlers who purchased all of their allocations from previous offers on a first-come first-served basis

and such offer shall be open to handlers for one business day. Any handler who had no shipments or acquisitions of raisins during the prior crop year will be allocated raisins under these offers on the basis of his acquisition (up to the time the original offer is made) of raisins in the current crop year. If field prices are not established, the offer shall be made not more than fifteen days following such establishment. The price of reserve tonnage raisins offered to handlers to sell as free tonnage, pursuant to this paragraph, shall be the established field price for free tonnage raisins of that varietal type, plus 3 percent of the established field price, plus the estimated costs incurred by the Committee for equity holders.

(h) Publicity. The Committee shall promptly give reasonable publicity to producers, dehydrators, handlers, and the cooperative bargaining association(s) of each meeting to consider a marketing policy or any modification thereof, and each such meeting shall be open to them. Similar publicity shall be given to producers, dehydrators, handlers, and the cooperative bargaining association(s) of each marketing policy report or modification thereof, filed with the Secretary and of the Secretary's action thereon. Copies of all marketing policy reports shall be maintained in the office of the Committee, where they shall be made available for examination by any producer, dehydrator, handler, or cooperative bargaining association representative. The Committee shall notify handlers, dehydrators and the cooperative bargaining association(s), and give reasonable publicity to producers of

its computation of the trade demand, preliminary percentages, and interim percentages and shall notify handlers, dehydrators, and the cooperative bargaining association(s) of the Secretary's action on percentages by registered or certified mail.

[48 FR 32976, July 20, 1983, as amended at 50 FR 1831, Jan. 14, 1985; 54 FR 24670, June 9, 1989]

Effective Date Notes: 1. At 54 FR 24670, June 9, 1989, in Sec. 989.54, in paragraph (a), the sentences, "The desirable carryout shall be increased from 45,000 to 60,000 tons for Natural (sun-dried) Seedless raisins at a rate of 5,000 tons per year for the three crop years following the effective date of this amended subpart. The desirable carryout for Dipped Seedless raisins shall be 1,500 tons, and for Oleate and Related Seedless raisins 1,500 tons." were suspended indefinitely, effective July 10, 1989.

2. At 62 FR 50484, Sept. 26, 1997, in paragraph (g), the words "On or before November 15 of the crop year" and "simultaneous" in the first sentence were suspended indefinitely, effective Sept. 29, 1997.

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7 C.F.R. Sec. 989.55 Regulation by the Secretary.

Whenever the Secretary finds, from the recommendation and supporting information supplied by the Committee or from other available information, that to designate final free and reserve percentages for any varietal type of standard raisins acquired by handlers, during the crop year will tend to effectuate

the declared policy of the Act, the Secretary shall designate such percentages. In the event the Secretary finds that suspension or termination of any percentages computed by the Committee or designated by the Secretary tend to effectuate the declared policy of the Act, the Secretary shall suspend or terminate such percentages.

[48 FR 32977, July 20, 1983]

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7 C.F.R. Sec. 989.65 Free and reserve tonnage.

The standard raisins acquired by handlers which are free tonnage, and any reserve tonnage purchased for free use, may be disposed of by him in any marketing channel, subject to the applicable provisions of this part. A handler's free tonnage of a varietal type of raisin shall be either the free percentage of the standard raisins of the varietal type acquired by him or all of the standard raisins of the varietal type acquired by him if no free percentage is established by the Committee or designated by the Secretary for that varietal type. A handler's reserve tonnage of a varietal type shall be the reserve percentage of the standard raisins of that varietal type acquired by him.

[48 FR 32977, July 20, 1983]

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7 C.F.R. Sec. 989.66 Reserve tonnage generally.

(a) The standard raisins acquired by a handler which are designated as reserve tonnage and reserve tonnage transferred to a handler by the committee shall be held by him for the account of the committee and subject to the applicable restrictions of this part.

(b)(1) Each handler shall hold in storage all reserve tonnage acquired by him and all reserve tonnage transferred to him by the committee until he has been relieved of such responsibility by the committee either by delivery to the committee or otherwise. Such handler shall store such reserve tonnage raisins in natural condition without addition of moisture and in such manner as will maintain the raisins in the same condition as when he acquired them, except for normal and natural deterioration and shrinkage, and except for loss through fire, acts of God or other conditions beyond the handler's control.

(2) Reserve tonnage acquired by a handler or transferred to a handler by the committee shall be stored separate and apart from other raisins to such extent and identified in such manner as the committee shall specify in its rules and procedures with the approval of the Secretary.

(3) Each handler may, under the direction and supervision of the committee, substitute for any reserve tonnage raisins a like quantity of standard raisins of the same varietal type and of the same or more recent year's production. Each such handler

shall give the committee reasonable advance notice of his intention to substitute, the exact location of the raisins for which substitution is to be made, and arrange with the committee a mutually satisfactory time for the substitution.

(4) The committee may, after giving reasonable notice, require a handler to deliver to it, or to anyone designated by it, at such handler's warehouse or at such other place as the raisins may be stored, part or all of the reserve tonnage raisins held by such handler. Reserve tonnage raisins delivered by any handler to the committee, or to any person designated by it, in the form of natural condition raisins shall in the aggregate be not more than 2 percent less than the average maturity level of all raisins such handler acquired during the applicable crop year. The committee may require that such delivery consist of natural condition raisins, or it may arrange for such delivery to consist of packed raisins.

(c) Each handler shall, at all times, hold in his possession or under his control reserve tonnage referable to his acquisitions of standard raisins and reserve tonnage transferred to him by the committee, less any quantity of such reserve tonnage released to him by a change of percentages, delivered by him pursuant to instructions of the committee or sold to him by the committee.

(d) Reserve tonnage raisins delivered by any handler to the committee, or to any person designated by it, whether in the form of natural condition raisins

or packed raisins shall meet the applicable minimum grade or grade and condition standards, except for normal and natural deterioration. The committee shall have the authority to require, in its discretion and at its expense, such reinspection and certification of reserve pool tonnage raisins as it may deem necessary.

(e) In the event the committee offers to handlers reserve tonnage raisins for contract packing or for sale in export, as provided in Sec. 989.67, each handler shall be given the opportunity to pack or purchase his share of each offer.

(f) Handlers shall be compensated for receiving, storing, fumigating, handling, and inspection of that tonnage of reserve raisins determined by the reserve percentage of a crop year and held by them for the account of the committee, in accordance with a schedule of payments established by the committee and approved by the Secretary. A box rental shall be paid by the committee to producers or handlers for boxes used in storing reserve tonnage raisins beyond the crop year of acquisition in accordance with a rental schedule established by the committee and approved by the Secretary. The handler compensation shall be reviewed annually and shall be paid, as to the amount determined to be earned and unpaid, as soon as practicable after the end of the second quarter of the crop year and quarterly thereafter. Any handler may request the committee, by registered or certified mail, at any time after June 1 of a crop year to remove or relocate reserve tonnage raisins of the

current crop year which remain in his possession. At any time during a crop year, a handler may request removal or relocation of reserve tonnage of a prior crop year. In each instance, he may request that the committee provide the necessary containers for any such removal or relocation. When so requested as to current crop year raisins, the committee shall make the removal or relocation, the availability of containers, storage space and time of request permitting, by September 15 of the subsequent crop year, and as to raisins of the prior crop year, within 30 days, supplying the necessary containers if so requested. If the committee removes or relocates reserve raisins of the current crop year pursuant to a handler's request, and such raisins are released to him by September 15 of the subsequent crop year, the handler shall reimburse the committee for any costs incurred by it in such removal or relocation. If any handler requests removal or relocation of reserve raisins, the committee shall immediately give notice thereof to the Secretary.

(g) The committee shall have the authority, in its discretion, to obtain loans, nonrecourse or otherwise, on any part of the reserve tonnage not subject to release as desirable free tonnage and to pledge or hypothecate the raisins on which such loans are obtained as security therefor: Provided, That in every such case, there shall be included in the loan agreement a provision to the effect that, in case the lender obtains possession or control of such raisins, he will dispose of them in such a manner as will not tend to

defeat the objectives of this amended subpart. The net proceeds of any such loan shall be distributed by the committee pursuant to paragraph (h) of this section.

(h) The net proceeds from the disposition of reserve tonnage raisins of any varietal type shall be distributed by the committee to the respective producers, or their successor in interest thereto, on the basis of the volume of their respective contributions to the reserve tonnage of such varietal type. Distribution of the proceeds in connection with the reserve tonnage contributed by a nonprofit cooperative marketing association which has authority to market the raisins of its members and to allocate the proceeds therefrom to such members shall be made to such association. Advance or progress payments may be made by the committee, in conformity with the provisions of this paragraph, as sufficient funds become available.

[32 FR 12161, Aug. 24, 1967, as amended at 37 FR 19623, Sept. 21, 1972; 41 FR 32417, Aug. 3, 1976; 42 FR 37202, July 20, 1977; 48 FR 32977, July 20, 1983; 54 FR 34138, Aug. 18, 1989]

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7 C.F.R. Sec. 989.73 Reports.

(a) Inventory reports. Each handler shall, upon request of the committee, file promptly with the committee a certified report, showing such information as the committee shall specify with respect to

any raisins which were held by him on a date designated by the committee, which information as specified may include, but not be limited to: (1) The quantity of any raisins so held, segregated as to varietal type, natural condition, packed, standard quality or off-grade quality; and (2) the locations of the raisins.

(b) Acquisition reports. Each handler shall submit to the committee in accordance with such rules and procedures as are prescribed by the committee, with the approval of the Secretary, certified reports, for such periods as the committee may require, with respect to his acquisitions of each varietal type of raisins during the particular period covered by such report, which report shall include, but not be limited to: (1) The total quantity of standard raisins acquired; (2) the quantity of reserve tonnage referable to his acquisitions of standard raisins; (3) the locations of such reserve tonnages; (4) the total quantity of off-grade raisins acquired pursuant to Sec. 989.58(e)(1)(i), and (5) cumulative totals of such acquisitions from the beginning of the then current crop year to and including the end of the period for which the report is made. Upon written application made to the committee, a handler may be relieved of submitting such reports after completing his packing operations for the season. Upon request of the committee, each handler shall furnish to the committee, in such manner and at such times as it may require, the name and address of each person from whom he

acquired raisins and the quantity of each varietal type of raisins acquired from each such person.

(c) Each handler shall file such reports of creditable promotion including paid advertising as recommended by the Committee and approved by the Secretary.

(d) Other reports. Upon the request of the committee, with the approval of the Secretary, each handler shall furnish to the committee such other information as may be necessary to enable it to exercise its powers and perform its duties under this amended part.

[25 FR 12813, Dec. 14, 1960, as amended at 32 FR 12164, Aug. 24, 1967; 32 FR 18086, Dec. 19, 1967; 48 FR 32978, July 20, 1983]

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7 C.F.R. Sec. 989.166 Reserve tonnage generally.

(a) Set-aside obligations – (1) Natural (sun-dried) Seedless. Handlers who acquire any lot of natural condition Natural (sun-dried) Seedless raisins which have been dipped in or sprayed with water, with or without chemicals, prior to or during the drying process, for purposes other than to expedite drying, or that have been produced from seedless varieties of grapes other than Thompson Seedless (i.e., Fiesta, Emerald Seedless, Perlette, Delight, and other similar grape varieties), or that have been treated with Oleate or similar drying agents, or such other Natural (sun-dried) Seedless raisins that have

been produced using other cultural practices as recommended by the Committee with the approval of the Secretary, may set aside such raisins to satisfy their reserve pool obligation: Provided, That such raisins shall be identified by the Inspection Service affixing to one container on each pallet or to each bin in each lot, a prenumbered RAC control card (to be furnished by the Committee) which shall remain affixed until raisins are processed or disposed of as natural condition raisins: and Provided further, That such raisins shall not be delivered to the Committee or transferred to another handler without approval of the Committee or the receiving handler.

(2) Mixed varietal types. A handler who acquired any lot of natural condition raisins of mixed varietal types (commingled within their containers) shall meet the reserve tonnage setaside obligation for each varietal type contained in the mixed lot by setting aside raisins of each such varietal type which have not been mixed or commingled with raisins of any other varietal type. The obligation as to each varietal type shall be computed according to the reserve percentage established by the Secretary, and the percentage of the varietal type contained in the mixed lot as shown by the incoming inspection certificate applicable thereto.

(b) Storage of reserve tonnage raisins – (1) Time limits for setting aside pool tonnage. Handlers shall be allowed 3 calendar days (exclusive of Saturdays, Sundays, and holidays), after the preliminary or interim percentages have been computed and announced

by the Committee, and after the publication in the Federal Register of the applicable final reserve percentages established for the crop year, or after any reserve tonnage raisins are acquired subsequent to the percentages being announced or established, to segregate and properly stack each varietal type of reserve tonnage raisins.

(2) Conditions. Each handler shall store reserve tonnage raisins in storage and under conditions which protect them from rain and which reasonably can be expected to maintain the raisins free of any biological or other infestation or contamination. Each handler shall, pursuant to Sec. 989.66(b)(2), store each varietal type of reserve tonnage raisins held by him for the account of the Committee, separate and apart from all other raisins. Storage of such raisins shall be deemed "separate and apart" if the containers are so marked and placed as to be capable of ready and clear identification as to the category in which are held. Reserve tonnage raisins shall be stored in sweat boxes, picking boxes, or other portable containers not exceeding one ton capacity:

(3) Substitution of free tonnage. A handler may, pursuant to Sec. 989.66(b)(3), after giving the Committee reasonable advance notice in writing and under its direction and supervision, substitute standard raisins for reserve tonnage raisins.

(c) Remedy in the event of failure to deliver reserve tonnage raisins. A handler who fails to deliver to the Committee, upon request, any reserve tonnage

raisins in the quantity and quality for which he has become obligated (after any shrinkage allowances which may then be in effect are applied and allowances for any deterioration due to conditions beyond his control are made) shall compensate the Committee for the amount of the loss resulting from his failure to so deliver. The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types, plus any charges already paid or credited to the handler and cost incurred by the Committee on account of the handler's failure to deliver. The weighted average price shall be determined from those sales made during the particular crop year up to the time such cash payment is requested by the Committee, or up to the end of the particular crop year, whichever date may be earlier. The amount which a handler shall compensate the Committee for any reserve raisins which have deteriorated so as to be off-grade in quality during storage for reasons within his control, shall be the latest weighted average price received by the Committee for the applicable varietal type of reserve pool raisins, less the amount actually received by the Committee in the disposition of the deteriorated raisins delivered by the handler (or the salvage value of such raisins as determined by the Committee). Any amounts paid to the Committee in satisfaction of such deficiencies shall accrue to the earnings of the applicable reserve

pool. The remedies provided in this paragraph shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act for failure on the part of the handler to comply with the applicable provisions of the act or of this part.

(d) Disposition of reserve tonnage raisins which become off-grade for causes beyond the handler's control. Any reserve tonnage raisins held by or for the account of the Committee which become off-grade for reasons beyond the handler's control shall, at the Committee's discretion, be reconditioned or disposed of by the Committee, or under the Committee's control, in eligible nonnormal outlets. Any monetary loss sustained in the reconditioning or disposition of such raisins, not covered by insurance carried by the Committee, shall be charged to the applicable reserve pool.

(e) Offers of reserve tonnage raisins to handlers for sale in export. Whenever the Committee offers reserve tonnage raisins to handlers for sale in export, it shall specify in addition to the normal contract terms and conditions, the total quantity, the price and period within which each handler will be permitted to purchase his share of the offer. Whenever a handler's share of an offer is less than, or exceeds, his holding of reserve tonnage raisins by not more than 10 tons, the Committee may adjust his share so as to avoid the cost involved in the physical transfer of raisins. If, prior to the expiration of the offer period, a handler desires to obtain reserve tonnage in an amount greater than that represented by his share of the

offer, he may negotiate with another handler for any unpurchased portion of the other handler's share of an outstanding offer. No such transaction shall be deemed to reduce the transferring handler's share or to increase the transferee handler's share so as to affect either handler's share privileges in subsequent offers. Transfers to implement such transactions between handlers shall be permitted by the Committee only upon receipt of written authorization, on a form furnished by the Committee, by the transferring handler. All limitations applicable to the transferred tonnage shall continue to apply. Such reserve tonnage raisins will be released by the Committee to the transferee handler upon submission of his completed application and full payment for such raisins, and such transferee handler shall be responsible to the Committee for all documentation required in connection with the transaction. All such transfers shall be made at the expense of the handlers concerned.

[32 FR 15916, Nov. 21, 1967, as amended at 38 FR 14960, June 7, 1973; 42 FR 52377, Sept. 30, 1977; 49 FR 18731, May 2, 1984; 54 FR 29327, July 12, 1989; 56 FR 38072, Aug. 12, 1991; 68 FR 42947, July 21, 2003]

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(2)

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SUPREME COURT, U.S.

In the
Supreme Court of the United States

JOYCE EVANS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Federal law requires any person selling raisins in interstate commerce to transfer a fraction of her annual crop—sometimes as much as 50%—to the government's sole possession as a condition for selling the remaining raisins in "interstate commerce." Is the confiscation of Petitioners' raisins a compensable taking of private property in violation of the Fifth Amendment, or is it a voluntary program under which farmers merely pay an "admission fee" in exchange for the opportunity to sell the raisins that they have grown?

2. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court rejected the proposition that a property owner who obtains property knowing of the existence of a confiscatory regulation governing that property is thereby barred from seeking just compensation. The decision below holds that a business that enters a market that is governed by a confiscatory regulation is thereby barred from seeking compensation. Is the decision below contrary to the rule articulated in *Palazzolo*?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit, public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. Thousands of individuals across the country support PLF, as do numerous organizations and associations. PLF is headquartered in Sacramento, California, and has offices in Washington State, Florida, Hawaii, and a liaison office in Alaska.

PLF attorneys actively engage in research and litigation over a broad spectrum of public interest issues, and particularly on matters of private property rights and economic liberty. PLF attorneys have written extensively on property rights and the right to economic freedom. *See, e.g.*, Timothy Sandefur, *Cornerstone of Liberty: Property Rights in 21st Century America* (2006); James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. Envtl. Aff. L. Rev. 1 (2002). PLF attorneys devote substantial resources to litigating these matters by

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

appearing as counsel or as amicus curiae in cases before federal and state courts. For example, PLF attorneys represented property owners before this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and appeared as amicus curiae in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), and virtually every other major property rights case heard by this Court in the last twenty-five years. PLF was granted leave to appear as amicus curiae in this case by both the Court of Claims and the Federal Circuit. Written consent for the filing of this brief was granted by counsel for all parties and lodged with the Clerk of the Court.

SUMMARY OF THE CASE

Every year, a significant portion—often half—of the entire California raisin crop[2] is confiscated by the federal government for the sole purpose of making raisins more expensive. *See Lion Raisins, Inc. v. United States*, 58 Fed. Cl. 391, 394 (2003) ("By regulating the amount of raisins in this market, the [government] can, in effect, regulate the price at which raisins are sold domestically."); Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 6 (1995) (The "primary focus" of the market control program at issue here is "to maximize return to the grower.").

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[2] California's San Joaquin Valley is the world's largest producer of raisins, providing half of all raisins. *See* Cal. Raisin Marketing Board, *available at* http://www.calraisins.org/about_us/industry_information/history.cfm (last visited Dec. 21, 2007).

This taking is carried out pursuant to "marketing orders" adopted by the United States Department of Agriculture (USDA) and administered by the USDA's Raisin Administrative Committee (RAC), which sets an annual percentage of the raisin crop that growers must relinquish before they may sell their raisins in interstate commerce. In 2005, the RAC designated 17.5% of raisins for transfer to the government. *See* Raisin Administrative Committee, *Analysis Report August 1, 2006*, at 55 (Feb. 2007).[3] In 2002 it was 47%; in 1983, 62.5% of all raisins were taken by the RAC under this program. *Id.*

The law requires that the raisins be surrendered when growers transfer their crop to packers, who prepare the raisins for the retail market. Once taken, the raisins are sold under a government-owned brand name, and the proceeds of these sales are then used to subsidize American raisin producers who sell raisins overseas. *Lion Raisins*, 58 Fed. Cl. at 394. What money remains after these subsidies is then returned to the farmers whose raisins were confiscated. *Id.* The money returned is therefore only a fraction of the actual value of the seized raisins. *Id.*

The Petitioners filed this suit in the Court of Claims arguing that they were not being paid the just compensation to which they are constitutionally entitled. But the court dismissed the case, holding that they had *voluntarily relinquished* their raisins by choosing to sell raisins in interstate commerce, and thus subjecting themselves to the marketing order mechanism. *Evans v. United States*, 74 Fed. Cl. 554,

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[3] *Available at* http://www.raisins.org/Analysis_report/Analysis_report.pdf (last visited Dec. 21, 2007).

564 n.16 (2006). The court interpreted the farmers' right to sell their crop as a privilege, rather than a right, and held that the confiscation of their raisins was a "toll" or "admissions fee" for the privilege of selling their raisins in "interstate commerce." *Id.* at 563-64. The Federal Circuit affirmed without opinion. *Evans v. United States*, No. 2007-5045, 2007 WL 2908212, at *1 (Fed. Cir. Oct. 4, 2007).

SUMMARY OF REASONS FOR GRANTING THE PETITION

The basic question in this case is whether the confiscation of Petitioners' raisins can be described as voluntary. The Court of Claims found that although a regulation of commerce whereby government converts a physical asset might qualify as a compensable taking, the Petitioners here waived their rights to compensation. There were essentially two interrelated grounds for this conclusion: *First*, the Petitioners were aware of the existence of the confiscation requirement when they chose to enter the market, and cannot therefore be heard to complain of the taking. *Evans*, 74 Fed. Cl. at 563-64. *Second*, access to the interstate market is a privilege for which the government can require an "admissions fee." *Id.* These holdings warrant *certiorari* review by this Court for four reasons.

1. In *Palazzolo*, 533 U.S. 606, this Court rejected the notice/consent rule under which a property owner was blocked from seeking compensation for regulatory takings if he took title to land knowing of the existence of a confiscatory regulation. Such a rule, the Court declared, would allow government "to put an expiration date on the Takings Clause," *id.* at 627, and to misconstrue property rights (the taking of which

government must pay for) as privileges (for which an individual may be forced to pay). *Id.*

Nevertheless, some lower courts—including the Court of Claims here—continue to apply this notice/consent rule to bar legitimate takings claims on the theory that a property owner "consents" to the taking of her property if she is on "notice" of the existence of a confiscatory regulation and chooses to exercise the rights of ownership. *See, e.g., Sanderson v. Town of Candia*, 787 A.2d 167, 169 (N.H. 2001); *Hallco Texas, Inc. v. McMullen County, Texas*, 94 S.W.3d 735, 738 (Tex. App. 2002), *aff'd* 221 S.W.3d 50 (Tex. 2006). Other courts have declined to apply this notice/consent rule, including the First, Eleventh, and Federal Circuits, which directly conflict with the decision here. *See Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 47 (1st Cir. 2002) (en banc); *Gulf Power Co. v. United States*, 187 F.3d 1324, 1331 (11th Cir. 1999).

The contrary conclusion reached by the Court of Claims in this case would transform virtually every taking into a noncompensable "voluntary" relinquishment of property. This Court rejected that proposition not only in *Palazzolo*, but also in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982), and *Nollan*, 483 U.S. at 833 n.2.

2. Even if the Petitioners' right to sell their raisins *were* properly characterized as a privilege rather than a property right, the decision below conflicts with repeated holdings by this and other courts in such "unconstitutional conditions" cases as *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547-48 (2001), *Dolan v. City of Tigard*, 512 U.S. 374, 385

(1994), *Reilly*, 312 F.3d at 47, and *Gulf Power*, 187 F.3d at 1331. Those cases hold that government "may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit." *Dolan*, 512 U.S. at 385. Yet the Court of Claims concluded that a farmer's right to sell the raisins she has grown is a privilege which can be conditioned on a burdensome "toll"—namely, the uncompensated seizure of a substantial portion of her raisin crop. This conclusion is particularly onerous given that the regulations at issue, combined with this Court's broad interpretation of "interstate commerce," mean that Petitioners *could not possibly have avoided* "consenting" to the taking of their raisins if they had tried. Both the Court of Claims and the Federal Circuit failed to address the unconstitutional conditions issues in their decisions despite briefing on the subject.

3. Demands for just compensation under this program can be brought only in the Federal Court of Claims and appealed from there to the Federal Circuit, meaning that other circuits will not normally have an opportunity to consider this issue prior to this Court's review, and the decisions of the Federal Circuit will otherwise settle the law. There is little reason, therefore, to allow these issues to remain with the courts of appeals for further consideration prior to review on certiorari.

4. This case involves an unusually important federal government program. The agricultural adjustment mechanism at issue here involves the seizure of more than 17%, and often half, of the Petitioners' entire raisin crop—which is to say, half of

the entire raisin crop of the United States—solely for the purpose of increasing the domestic price of food. Bensing, *supra*, at 6. This is significant not only given the intrinsic importance of the supply of foodstuffs at affordable prices, but also the existence of many similar programs governing the production of almonds, peaches, and other agricultural products.

ARGUMENT

I

CERTIORARI IS WARRANTED TO CLARIFY THAT THE "NOTICE RULE" APPLIES ONLY TO RESTRICTIONS OF GOVERNMENT PRIVILEGES AND *NOT* TO TAKINGS OF PROPERTY RIGHTS

The decision below holds that the Petitioners constructively consented to the taking of their raisins by choosing to enter the interstate market which they knew was governed by the confiscation requirement. *Evans*, 74 Fed. Cl. at 564 n.16. The government "does not force plaintiffs to grow raisins or to market the raisins," the court concluded; it merely "directs that *if* they grow and market raisins, then passing title to their 'reserve tonnage' raisins to the RAC is their admission ticket" to the interstate market. *Id.* at 564. Because they were on notice of the existence of this requirement, the Petitioners consented to the taking of their raisins, and were therefore barred from seeking compensation. This notice/consent rule, however, is contrary not only to repeated decisions of this Court, but to the decisions of the First, Eleventh, and Federal Circuits, which have restricted the rule to a narrow class of cases readily distinguishable from this one.

A. This Court Has Repeatedly Declared That the "Notice"/"Consent" Rule May Not Bar Compensation for Takings of Property Rights

The notice/consent theory adopted below is essentially the same rule which this Court has repeatedly rejected in property rights cases—most notably in *Palazzolo*, 533 U.S. 606, but also in *Loretto*, 458 U.S. at 439, and *Nollan*, 483 U.S. at 833 n.2. Under this rule, a property owner who gains title to property while aware of the existence of a confiscatory regulation (*Palazzolo*), or who enters a market that is governed by a confiscatory rule (*Loretto*), is purportedly barred from seeking just compensation for that taking. Despite frequent repudiation by this Court and some courts of appeals, that rule is still often applied by other lower courts, including the court below. This warrants *certiorari* review. *Cf. Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975) (certiorari granted where lower courts "conflict[ed] in principle"); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 846 (1974) (same).

The notice/consent rule originated in a misunderstanding of this Court's decision in *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984), which found that the Monsanto company could not have formed a "reasonable investment-backed expectation" that the government would refrain from ordering the disclosure of its trade secrets, since the company was aware of the possibility that Congress might order disclosure and had chosen to take that risk in exchange for certain government benefits. In *Nollan*, 483 U.S. at 833 n.2, this Court reiterated that the *Monsanto* notice/consent rule applies only when the

property at issue is a "'*[g]overnment benefit*,'" *id.* at 833 n.2 (citation omitted), and does *not* apply to takings of property rights. Whereas Monsanto had sought to register its insecticide for a special government license, the property owners in *Nollan* were seeking a building permit, and "the right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.'" *Id.* (citation omitted). Thus the notice/consent rule could not cut off their rights.

This Court emphasized the limitations on the notice/consent rule in *Palazzolo*, when it found that the fact that a party knew of a land-use regulation before taking title to property was not enough to bar the person from demanding just compensation. Applying the notice/consent rule outside the context of government *privileges* was inappropriate, the Court held, because it would "put . . . a Hobbesian stick into the Lockean bundle" of property rights. 533 U.S. at 627.[4] The "Hobbesian stick" is the notion that property rights are simply government "privileges." Conflating these two categories would lead to a state of affairs where "the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to

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[4] In her concurring opinion in *Palazzolo*, Justice O'Connor held that a property owner's awareness of the existence of a confiscatory rule might be considered as one among many elements in a court's consideration of a regulatory taking. 533 U.S. at 633. Since this case involves a *physical* taking, such an analysis would not apply. But even if it did, this Court should grant certiorari to clarify under what circumstances a property owner's awareness of existing regulations should defeat a takings claim. A rule articulated only in a concurring opinion leaves lower courts in doubt as to the proper analysis.

put an expiration date on the Takings Clause. This ought not to be the rule." *Id.* Thus, while awareness of the existence of a regulation might cut off the rights of those seeking government privileges, as in *Monsanto*, it does *not* cut off the rights of those who seek protection for property rights arising from some other source.

That this reasoning is not confined to the land-use context is made clear by *Loretto*. There the government argued that the landowner constructively consented to the taking of her property because she was aware of the rule requiring the permanent physical invasion of her property when she chose to enter the market by renting it out, 458 U.S. at 438-39—the same argument adopted by the court below in this case. This Court rejected that theory: "It is true," wrote Justice Marshall for the majority, "that the landlord could avoid the requirements . . . by ceasing to rent the building to tenants. *But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.*" *Id.* at 439 n.17 (emphasis added). The contention that the taking was simply part of an economic regulation "prove[d] too much," because under that theory the government could

> require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices.

Id. The rights of property owners "cannot be so easily manipulated." *Id.*

Here, the conclusion that a property owner who seeks to sell her produce must "pay[] . . . a toll" for the privilege, *Evans*, 74 Fed. Cl. at 563-64, likewise proves too much and would enable the government to require virtually any concession from a party who engages in commercial activity. This Court has repeatedly held that the principle of unconstitutional conditions does not allow government to demand such concessions from property owners in exchange for permission to use their property. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 385.

B. Some Federal and State Courts Continue to Misapply the Notice/Consent Rule in Property Rights Cases, While Others Have Properly Limited It to Government Privilege Cases

Although *Nollan*, *Palazzolo*, and *Loretto* make clear that mere awareness of the existence of a confiscatory regulation cannot bar a property owner's pursuit of just compensation—or qualify as "consent" to the taking—lower courts are still in disarray[5] as to

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[5] In addition to those cases cited in the text, cases **rejecting** the notice/consent rule in the property rights context include *Rucci v. City of Eureka*, 231 F. Supp. 2d 954, 957 (E.D. Mo. 2002); *State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345, 352-53 (Ohio 2002); *Richard Roeser Prof'l Builder, Inc. v. Anne Arundel County*, 793 A.2d 545, 555-60 (Md. 2002). Cases **applying** the notice/consent rule in the property rights context include *TG Dev., L.L.C. v. Charter Twp. of Mt. Morris*, No. 243019, 2004 WL 594950, at *10 (Mich. Ct. App. Mar. 25, 2004); *Centeno v. City*

(continued...)

the applicability of the notice/consent rule in suits for just compensation. *See generally* J. David Breemer & R. S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 Sw. U. L. Rev. 351, 409-17 (2005).

Phillip Morris, Inc. v. Reilly, 113 F. Supp. 2d 129 (D. Mass. 2000), presents a case similar to this one, and demonstrates the confusion that remains in lower courts regarding the notice/consent rule. There, the district court found that a Massachusetts law requiring tobacco companies to disclose the ingredients of their products effected a regulatory taking. The government argued that the companies were aware of the disclosure requirement when they chose to sell their products in Massachusetts, and therefore had effectively consented to the taking, *id.* at 144, but the trial court rejected this theory as a misapplication of the *Monsanto* notice/consent rule: " '[P]ermission to continue operating a lawful business is not the type of government benefit' " to which the notice/consent rule could apply, the court concluded. *Id.* (quoting *Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 679 (1st Cir. 1998)). The idea that a business' awareness of the existence of a confiscatory rule thereby cut off that business' right to just compensation "rests on the positivist notion[6] that since, in a broad sense, all property rights emanate from the State, the State is

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[5] (...continued)
of Alamo Heights, No. 04-02-00677-CV, 2004 WL 624554, at *2 (Tex. App. Mar. 31, 2004).

[6] This "positivist notion" is the same "Hobbesian Stick" rejected by this Court in *Palazzolo*, 533 U.S. at 627.

free to take them away whenever it determines to do so. That proposition must be rejected." *Reilly*, 113 F. Supp. 2d at 145.

That decision was initially reversed by the First Circuit, which held that the notice/consent rule *did* bar the plaintiff's claims because "the ability to market tobacco products in Massachusetts" *was* a privilege for which the state could demand concessions from the tobacco companies. *Philip Morris, Inc. v. Reilly*, 267 F.3d 45, 59 (1st Cir. 2001). But this panel decision was then reversed by the *en banc* court, 312 F.3d 24, which reinstated the district court's opinion and found that the notice/consent rule did *not* apply. "[A]llowing a manufacturer to simply sell its legal product" is a right inhering in ownership, "similar to building on one's land," and is not "a valuable government benefit" which can be conditioned on the taking of property. *Id.* at 47. The state's attempt to "condition the right to sell tobacco on [a] forfeiture" was "an unconstitutional taking of the tobacco companies' products." *Id.*

This conclusion was consistent with *Harshbarger*, which also found that the right to sell one's products in a market is not a privilege which can be conditioned on a taking of property: "[T]he state's self-interested characterization of a right as a benefit," *Harshbarger* concluded, could not transform a property right—which must be paid for when taken—into a privilege for which the government can demand a fee. 159 F.3d at 677.

The decision in this case conflicts directly with *Harshbarger* and *Reilly* by holding that the raisin growers were aware of the confiscatory requirement and therefore constructively consented to the taking of

their raisins by entering that market. The First Circuit held that "[t]he ability to conduct (and, more especially, to continue to conduct) a lawful business . . . though subject to some governmental requirements, simply is not analogous" to the granting of a government benefit, and cannot be conditioned on the relinquishment of a property right, *id.* at 677. But the Federal Circuit in this case held that the ability to conduct lawful business selling raisins in the United States is a privilege which can be conditioned on the confiscation of Petitioners' property.

The Eleventh Circuit also rejected the notice/consent theory in *Gulf Power*, 187 F.3d 1324. There, the court found that a federal law which required utility companies to allow their wires to be accessed by cable television companies effected a compensable taking of the utility companies' property. The government contended that the utility companies chose to enter into the marketplace and thereby voluntarily relinquished their rights to just compensation. *Id.* at 1331. But, citing *Loretto*, the court concluded:

> [P]rotection against a permanent, physical occupation of one's property does not hinge on the choice of use for that property . . . . [T]he bundle of rights that a utility has in its property includes the right to permit its use for wire communications, and exercise of that right may not be conditioned on being forced to submit to a permanent, physical occupation of its property without payment of just compensation.

Id. That conclusion is flatly contrary to the decision here, which holds that the raisin growers *may* be forced

to consent to the permanent physical seizure of their raisins in exchange for the right to sell the remaining raisins.

The Federal Circuit itself has also rejected the notice/consent rule in property rights cases, which means that this case creates a conflict within the Federal Circuit itself. In *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003), property owners whose government mortgages included a provision allowing them to pay off their mortgages early sued when a federal law eliminated this provision. There was no question that the owners voluntarily participated in the government program. *Id.* at 1330. Moreover, the government argued that " 'enforceable rights sufficient to support a taking claim against the United States cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control.' " *Id.* But the Federal Circuit rejected this argument as one that "eviscerates century-old understandings of the stable and enduring nature of contract and real property rights." *Id.* at 1331. The court took "particular issue with the government's position that the Owners had no property interest because '[t]he prepayment provision contained in the [contracts] did not exist independently of, but rather was *subject to*, *limited by*, and *totally dependent upon*, [the] regulatory regime,'" *id.*—that is, that the prepayment option (like the sale of raisins here) was a privilege and not a right, and that the property owners had constructively consented to the unilateral elimination of their contract rights. This, the court declared, "cannot be, and is not, the law." *Id.* at 1331. The "regulated nature" of a given market is not "a talisman" that enables government to take assets without compensation. *Id.* at 1334. The

decision below—that the Petitioners knowingly entered a market that was subject to a confiscatory regulation and therefore that they are not entitled to compensation—therefore conflicts fundamentally with *Cienega Gardens*.

This division of authority regarding the applicability of the notice/consent rule is exacerbated by decisions of several state courts, some of which have applied the rule to bar compensation for regulatory takings even after *Palazzolo*. In *Sanderson*, 787 A.2d at 169, the New Hampshire Supreme Court found that a property owner had constructively consented to the taking of her property when she took title to land with knowledge of the existence of a severe land-use restriction. "The plaintiff purchased the property knowing both of the ordinance's frontage requirements and that the property lacked the required frontage," the court declared. "Thus, she purchased the hardship of which she now complains." *Id.* Likewise, the Texas Court of Appeals applied the notice/consent rule to bar a landowner's takings claim in *Hallco Texas*, when it found that a property owner could not form a compensable "investment-backed expectation" if she was aware that going into business would require the grant of a land-use permit. 94 S.W.3d at 738-39. The fact that the owner was aware of the requirement meant that government action denying the right to use the property "did not constitute a taking as a matter of law." *Id.* at 738. To name only one of many more examples, the Illinois Court of Appeals rejected a takings claim brought by a landowner on the grounds that "owners are charged with knowledge of relevant statutory provisions affecting the control or disposition of their property" in *Town of Georgetown v. Sewell*, 786 N.E.2d 1132, 1141 (Ind. Ct. App. 2003).

Certiorari is warranted here to clarify whether the *Monsanto* notice/consent rule applies in to takings claims involving not privileges but property rights.

C. The Characterization of the Taking of Petitioners' Raisins as "Voluntary" Creates a Significant Threat to the Viability of the Just Compensation Requirement

To understand the Court of Claims' holding that the Petitioners essentially consented to the confiscation of their raisins by choosing to sell them in interstate commerce, it is necessary to understand how the raisin marketing order scheme works.

Under the Agricultural Marketing Agreement Act (7 U.S.C. § 601, *et seq.*), any person may propose that the USDA establish a cartel for the sale of an agricultural product by petitioning for the creation of a marketing order. The marketing order, once adopted, applies to all producers in the market, whether or not those others agree with the marketing order proposal. *See* 7 C.F.R. § 900.3(a) (2007). Once a proposal is accepted by the USDA, the law provides for a referendum where growers may debate the proposed cartel agreement, but the Act allows agricultural cooperatives to bloc-vote in the referendum on behalf of all its members. *See Cecelia Packing Corp. v. USDA*, 10 F.3d 616, 619 (9th Cir. 1993). Since "there will not infrequently be a single cooperative corporation that dominates the production of the commodity," Bensing, *supra*, at 13, this provision allows cooperatives to override their members' actual preferences, and to muster the votes necessary to adopt or reject proposed marketing orders regardless of their constituents' desires.

Small-scale entrepreneurs are at an even worse disadvantage, since they lack political leverage within the agricultural community. Thus a grower who wishes to operate independently from her competitors is inherently and systematically excluded by what amounts to an agricultural guild system. *See further* Dennis M. Gaab, *The California-Arizona Citrus Marketing Orders: Examples of Failed Attempts to Regulate Markets for Agricultural Commodities*, 5 San Joaquin Agric. L. Rev. 119, 133-34 (1995) (noting case in which Sunkist bloc vote kept marketing order in place against the will of most growers). Courts have abetted this unfairness by refusing to accord the voting rights of dissenting growers the same strict scrutiny accorded to the right to vote in other governmental elections. *See, e.g., Cecelia Packing*, 10 F.3d at 624-25.

The purported "voluntariness" involved in the marketing order scheme is therefore illusory. A grower who does not wish to have her production subsumed within the cartel that another grower proposes has no realistic choice. Once that proposal is advanced and adopted by the USDA, she is subject to it. Her only hope for independence is to prevail at the referendum—where she will be overwhelmed by self-interested competitors and the unfairly weighted votes of conglomerates. As Professor McCloskey pointed out, "the scattered individuals who are denied access to an occupation by State-enforced barriers are about as impotent a minority as can be imagined." Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34, 50. To hold that they can "defend themselves through political action is to sacrifice their civil rights in the name of an amiable fiction." *Id.*

Dismissing this takings claim on the theory that the growers "choose" to participate in the program is analogous to denying compensation in an eminent domain case on the theory that a homeowner who voted against a citywide referendum on a development project, but was outvoted, thereby "volunteered" to have his property taken.

Finally, the broad scope of the federal power to regulate commerce also renders any "choice" that the Petitioners might have utterly illusory. The Claims Court's assertion that the Petitioners chose to enter the interstate market suggests that they could have chosen otherwise. But the virtually limitless regulatory power accorded Congress under the Commerce Clause, particularly after this Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), makes this no choice at all. The Petitioners could *not* have avoided the seizure by choosing a "purely intrastate" market for selling their raisins, since even the production and sale of raisins only within a state is still subject to regulation under the Commerce Clause. *See id.* at 18-19; *see also* 7 C.F.R. § 989.14 (2007) (applying reserve requirements to "any person who, within the area [*i.e.*, California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins"). Under *Wickard v. Filburn*, 317 U.S. 111, 115 (1942), and *Raich*, even if the Petitioners were to sell directly to pedestrians walking past their vinyeards, they would fall under the requirements of the raisin seizure rule.

Wickard and other cases have been predicated on the rationale that there are few if any logical dividing lines between intrastate and interstate commerce in a modern economy. The Court of Claims cannot

therefore posit some clear distinction between the two and then declare that Petitioners have sought entry into the interstate market, for which they must pay a "toll." In fact, Petitioners have only a Hobson's choice: if they choose to sell their raisins *at all*, they enter interstate commerce, and are subject to the Act and the confiscation requirement.

II

EVEN IF THE RIGHT TO SELL THEIR PROPERTY IS CHARACTERIZED AS A "PRIVILEGE," THE DECISION BELOW CONFLICTS WITH DECISIONS BY THIS COURT AND CIRCUIT COURTS REGARDING THE "UNCONSTITUTIONAL CONDITIONS" DOCTRINE

The Court of Claims based its holding on the conclusion that for Petitioners to sell the raisins that they have produced is a privilege rather than a right. *See Evans*, 74 Fed. Cl. at 563-64 ("[P]laintiffs are paying an admissions fee or a toll—admittedly a steep one—for marketing raisins."). This holding conflicts with centuries of Anglo-American jurisprudence, which holds that the producer of a lawful product has an inherent right to sell that product, unless he or she voluntarily relinquishes that right. *See, e.g.*, William Blackstone, 2 *Commentaries* *447 ("Where the vendor hath in himself the property of the goods sold, he hath the liberty of disposing of them to whomever he pleases, at any time, and in any manner."); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) ("[T]he right to pass on property . . . has been part of the Anglo-American legal system since feudal times."); *Hinkle Northwest, Inc. v. SEC*, 641 F.2d 1304, 1307 (9th Cir. 1981) ("'Ownership

is a collection of rights to use and enjoy property including the right to sell and transmit the same.' " (citation omitted)). There is no right more firmly rooted in this nation's history and tradition than the right of an agricultural producer to market his or her product.

Nevertheless, even if the right to sell an owned item is merely a privilege, that privilege may not be conditioned on the waiver of constitutional rights. As this Court has put it, government "may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit." *Dolan*, 512 U.S. at 385.

In *Reilly*, the First Circuit found that the government could not require a forfeiture in exchange for the right to sell a product in the marketplace, directly conflicting with this case. 312 F.3d at 46 (en banc). *See also Pharm. Care Mgmt. Ass'n v. Rowe*, No. 03-153-B-H, 2005 WL 757608, at *10 (D. Me. 2005) (interpreting *Reilly* as holding that "there is a constitutional right under the Takings Clause to access a state's markets without having first to satisfy a taking condition"). Similarly, in *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427 (6th Cir. 2005), the Sixth Circuit Court of Appeals found that a city's decision to withhold certain permit approvals from the proprietors of a bar unless they agreed to close the bar at 11 p.m. was an unconstitutional condition. *Id.* at 436. Even though the bar did not have a constitutional right to a liquor license, *id.* at 434, the city's attempt to restrict the business' ability to operate was an unconstitutional condition:

> [The city] cannot indirectly force [the bar] to close at 11:00 p.m. by withholding government benefits . . . . The due process violation at issue is the city's alleged requirement that [the bar] choose between its due process rights in certain hours of operation and the desired city approvals.

Id. at 436. Thus, both the First and Sixth Circuits have held that a party's access to a market is one of the constitutional interests secured by the unconstitutional conditions doctrine, contrary to the decision below.

Although the unconstitutional conditions doctrine was briefed in the court of appeals, that court affirmed without opinion. Given the "uncertainties surrounding application of the unconstitutional conditions doctrine," *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 279 (1998), certiorari is warranted to resolve whether the raisin growers could be required to relinquish their right to just compensation in exchange for access to the interstate market.

Indeed, the unconstitutional conditions doctrine is particularly important here, because, as explained above, the Petitioners *could not have avoided* the confiscation requirement. *Cf. Blackburn v. Snow*, 771 F.2d 556, 568 (1st Cir. 1985) (lack of genuine choice is particularly significant in unconstitutional conditions analysis); *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1428 (1989) ("[T]he Court has repeatedly suggested that the problem with unconstitutional conditions is their coercive effect."). Since selling agricultural products *at all* is virtually *per se* interstate commerce, the Petitioners would have been subject to the confiscation requirement no matter how they chose to

sell their raisins. This lack of choice implicates the unconstitutional conditions doctrine with particular force.

CONCLUSION

The petition for a writ of certiorari should be *granted.*

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